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No._____

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM RUZICKA,

Petitioner,

v

GENERAL MOTORS CORPORATION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, and its Local 166,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHERE THE UNION OWES A DUTY TO PROCESS A MERITORIOUS GRIEVANCE OF AN EMPLOYEE IN A NON-PERFUNCTORY FASHION, AND WHERE THE UNION HAS NEGLECTED TO TAKE A BASIC AND REQUIRED STEP IN THE EXCLUSIVE ARBITRATION AND GRIEVANCE PROCEDURES, AND WHERE THE UNION HAS MADE NO DECISION ON THE MERITS OF THE EMPLOYEE'S GRIEVANCE, AND WHERE THE GRIEVANCE INVOLVES IMPORTANT INDIVIDUAL RIGHTS SECURED BY THE CONTRACT, HAS THE UNION VIOLATED ITS DUTY OF FAIR REPRESENTATION BECAUSE OF ITS NEGLIGENCE?

II.

WHERE THE UNION AND EMPLOYER ESTABLISHED A PAST PRACTICE OF CUSTOMARY NON-ENFORCEMENT OF CONTRACT DEADLINES UNDER THE EXCLUSIVE ARBITRATION AND GRIEVANCE PROCEDURES IN THE CONTRACT, AND WHERE THE UNION NEGLECTS TO TAKE A BASIC AND REQUIRED STEP IN THE PROCEDURES IN ACCORDANCE WITH THE CONTRACT DEADLINES IN ACTUAL RELIANCE UPON THE ESTABLISHED PAST PRACTICE WITH THE EMPLOYER, AND WHERE THE UNION'S RELIANCE IS NOT MOTIVATED BY BAD FAITH, MAY THE EMPLOYEE UNDER THE *VACA* STANDARDS CHALLENGE THE UNION DECISION ON THE GROUNDS THAT IT WAS AN IRRATIONAL AND UNREASONED DECISION AND TOO INSUBSTANTIAL TO SUPPORT THE UNION ACTION WHEN THE UNION DECISION IS NOT A DECISION ON THE MERITS OF THE GRIEVANCE?

III.

DOES THE EMPLOYEE HAVE STANDING TO SEEK REVIEW OF THE DISTRICT COURT'S DECISION VACATING THE FAVORABLE ARBITRATION AWARD WHERE AN EMPLOYEE FILES SUIT, PURSUANT TO § 301, 29 USC § 185, AGAINST HIS EMPLOYER FOR WRONGFUL DISCHARGE AND JOINS IN THAT SUIT A CLAIM AGAINST HIS UNION FOR VIOLATION OF ITS DUTY OF FAIR REPRESENTATION, AND WHERE THE UNION IN THAT SUIT OBTAINS AN ORDER COMPELLING THE EMPLOYER TO ARBITRATE THE EMPLOYEE'S DISCHARGE GRIEVANCE, AND WHERE AN ARBITRATOR SELECTED BY THE EMPLOYER AND UNION HOLDS THAT THE EMPLOYEE'S DISCHARGE IS IN VIOLATION OF THE CONTRACT, AND WHERE THE UNION SEEKS TO ENFORCE THE FAVORABLE ARBITRATION AWARD, AND WHERE THE DISTRICT COURT VACATES THE FAVORABLE ARBITRATION AWARD, AND WHERE THE INTERESTS OF THE EMPLOYEE ARE NOT ADVERSE TO THE INTERESTS OF THE UNION IN ENFORCING THE FAVORABLE ARBITRATION AWARD, AND WHERE THE GRIEVANCE INVOLVES UNIQUELY PERSONAL RIGHTS, AND WHERE THE EMPLOYEE WILL OTHERWISE SUFFER SUBSTANTIAL HARM?

IV.

WHERE THE EMPLOYER AND UNION ESTABLISHED A PAST PRACTICE OF CUSTOMARY NON-ENFORCEMENT OF CONTRACTUAL DEADLINES IN THE EXCLUSIVE GRIEVANCE AND ARBITRATION PROCEDURES IN THE CONTRACT, AND WHERE THE UNION NEGLECTS TO TAKE A BASIC AND REQUIRED STEP IN THE PROCEDURES IN ACCORDANCE WITH THE CONTRACT DEADLINES, AND WHERE THE UNION'S NEGLECT IS ATTRIBUTED TO ITS RELIANCE ON THE PAST PRACTICE OF CUSTOMARY NON-ENFORCEMENT OF CONTRACT DEADLINES, AND

WHERE THE EMPLOYER REFUSES TO ABIDE BY THE ESTABLISHED PAST PRACTICE WITH THE UNION AND INSISTS ON THE STRICT REQUIREMENTS OF THE CONTRACT DEADLINES, AND WHERE THE EMPLOYER DEFENDS THE EMPLOYEE'S SUIT FOR WRONGFUL DISCHARGE IN VIOLATION OF THE CONTRACT ON THE GROUNDS THAT THE EMPLOYEE HAS FAILED TO EXHAUST THE CONTRACTUAL PROCEDURES, HAS THE EMPLOYER WAIVED OR REPUDIATED THE CONTRACTUAL PROCEDURES AND IS THE EMPLOYER THEREFORE ESTOPPED FROM RAISING THIS DEFENSE IN THE EMPLOYEE SUIT?

V.

WHERE, IN A DUTY OF FAIR REPRESENTATION SUIT, THE UNION OBTAINS A COURT ORDER COMPELLING THE EMPLOYER TO ARBITRATE THE EMPLOYEE'S GRIEVANCE, AND WHERE AT THAT STAGE OF THE LITIGATION THE ARBITRABLE ISSUE OF THE TIMELINESS OF THE GRIEVANCE IS SUBSTANTIALLY RESOLVED, AND WHERE THE ARBITRATION AWARD IS FAVORABLE TO THE EMPLOYEE, UNDER THOSE CIRCUMSTANCES, IS THERE A WAIVER BY VIRTUE OF FEDERAL LABOR POLICY OF THE ARBITRABLE ISSUE OF THE TIMELINESS OF THE EMPLOYEE'S GRIEVANCE SO AS TO ESTOP THE EMPLOYER FROM RELYING UPON THIS DEFENSE TO A FAVORABLE ARBITRATION AWARD?

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GENERAL MOTORS CORPORATION,
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and its Local 166,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Ruzicka v *General Motors Corp*, 336 F Supp 824 (E.D. Mich, 1972); 85 LRRM 2419 (E.D. Mich, 1973); 86 LRRM 2030 (E.D. Mich, 1973); rev'd, 523 F 2d 306 (6th Cir, 1975); reh. den., 528 F 2d 912 (6th Cir, 1975); 96 LRRM 2822 (E.D. Mich, 1977); vacated, 649 F 2d 1207 (6th Cir, 1981); 519 F Supp 893 (E.D. Mich, 1981); aff'd, __ F 2d __, 113 LRRM 2562 (6th Cir, 1983).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act of 1947, 28 U.S.C. § 185:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the Courts of the United States. Any money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> (c) For the purposes of actions and proceedings by or against labor organizations in the District

Courts of the United States, District Courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any Court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF THE CASE

Petitioner (hereinafter plaintiff), a long time union activist, was discharged from his employment at General Motors on March 31, 1971, for being intoxicated on the job and using threatening and abusive language towards his supervisors.

A grievance was filed protesting plaintiff's discharge by the duly authorized bargaining representative, Local 166, United Automobile Aerospace and Agricultural Implement Workers of America (UAW). The grievance was denied by local management and then appealed by the Union to the third step of the grievance procedure. In order to complete procedurally the third step of the grievance procedures, statements of unadjusted grievance were required, under paragraph 37 of the

contract, to be exchanged between the Union and the Local Management.

After two written extensions to exchange the statements were obtained by the Union, the contract exchange deadline became May 5, 1970. However, on May 5, 1970, the Union representative, Charles Panter, neglected to file the Union statement.

The Union's neglect was not discovered until May 25, 1970, when Mr. Panter's successor as Shop Chairman, William Moon, attempted to exchange with local management the Union statement. Management refused to accept the Union statement and refused to extend the contract deadline contending that the contract deadline had expired and, in accordance with paragraph 34 of the contract, management's paragraph 77 answer denying the grievance was the final decision on the grievance.

A policy grievance was filed by the Union contending that management failed to abide by past practice when it enforced the contract deadline. The policy grievance was subsequently withdrawn by the Union because it lacked merit.

On June 3, 1971, plaintiff filed a suit in the United States District Court for the Eastern District of Michigan. Jurisdiction was invoked under § 301, Labor Management Relations Act of 1947, 29 U.S.C. § 185(a). On November 29, 1973, District Judge John Feikens dismissed the claim against the Union, holding that the plaintiff failed to establish that hostility tainted the Union's handling of the grievance. Judge Feikens also dismissed the Union's cross-claim for arbitration against General Motors.

On September 23, 1975, the Sixth Circuit Court of Appeals reversed. The Sixth Circuit held that, when a union makes no decision as to the merits of a grievance and allows the grievance to expire by negligently failing

to take a basic and required step in a grievance procedure, it violates its duty of fair representation.

The Sixth Circuit also reversed the dismissal of the cross-claim for arbitration and ordered arbitration on the merits of the grievance. Arbitration of the grievance took place by the GM-UAW arbitrator. He held that discharge was too harsh a penalty for plaintiff's misconduct and ordered reinstatement.

After submission of additional proofs on the unfair representation claim, Judge Feikens confirmed the arbitration award and allocated damages against General Motors and the Union.

On June 2, 1981, the Sixth Circuit Court of Appeals reversed. The Sixth Circuit held that the District Judge erred when he failed to consider whether or not the Union representative relied on a past practice of freely granting extensions when he neglected to timely exchange the Union statement.

On remand, the District Judge found that the Union representative relied, in part, on the customary non-enforcement of contract deadlines at the plant. However, the Judge contradicted himself in footnote 4 of that Opinion, finding that since the plant practice only "extended" the deadline a few days and since the Union did not attempt to exchange the statements until three weeks after the deadline, the grievance was still untimely. The District Judge also vacated the arbitration award holding that the validity of arbitration was conditioned by a finding of unfair representation.

United States Court of Appeals for the Sixth Circuit affirmed. The Court held that reliance was determined by the union representative's motive or intent.

The Sixth Circuit held that only the Union could appeal the decision vacating the arbitration award.

Plaintiff had no standing to raise this issue in this appeal.[1]

REASONS FOR GRANTING THE WRIT

In a suit by an employee under § 301 against the employer for wrongful discharge and against the union for violation of its duty of fair representation, the question of the evidence necessary to establish a breach of the union's duty to process a meritorious grievance in a non-perfunctory fashion is an important and recurrent federal statutory question and has provoked a diversity of judicial opinion. The lower courts are hopelessly confused about the circumstances under which a union may violate its duty to process a meritorious grievance in a non-perfunctory fashion. The plaintiff contends that under *Vaca*, a union violates the perfunctory processing standard when the union, without having decided the merits of the grievance, allows the grievance to expire by its procedural negligence. This Court has not yet decided whether or not negligence principles should be applied under certain circumstances to union conduct which substantially prejudices an employee's grievance. A resolution of this question is of great importance to employees covered by collective bargaining agreements and their unions and employers.

In addition, this Court has not yet determined the circumstances under which a union violates its duty to avoid arbitrary conduct under the *Vaca* standards. There is a diversity of judicial opinion on whether or not a union violates its duty to avoid arbitrary conduct only

[1] The facts and law in this case are contained in the various decisions of the District Court and of the Sixth Circuit. *Ruzicka* v *General Motors Corp.*, 336 F Supp 824 (E.D. Mich. 1972), 85 L.R.R.M. 2419 (E.D. Mich, 1973), 86 L.R.R.M. 2030 (E.D. Mich, 1973), rev'd, 523 F 2d 306 (6th Cir, 1975), reh. denied, 528 F 2d 912 (6th Cir, 1975) [*Ruzicka I*], 96 L.R.R.M. 2822 (E.D. Mich, 1977), vacated, 649 F 2d 1207 (6th Cir, 1981) [*Ruzicka II*], 519 F Supp 893 (E.D. Mich, 1981), aff'd — F 2d —, 113 L.R.R.M. 2562 (6th Cir, 1983) [*Ruzicka III*].

when there is an intentional action designed to substantially prejudice the employee's grievance. There is also a diversity of judicial opinion on the circumstances under which a union may violate its duty of fair representation when it engages in honest and unintentional action which substantially prejudices an employee's grievance. Plaintiff contends that a union violates its duty to avoid arbitrary conduct when it makes an irrational and unreasoned decision which substantially prejudices the employee's grievance, especially when the union decision is not on the merits of the grievance.

This Court has never determined whether or not an order compelling arbitration is an available remedy to a union that has been joined as a defendant in an employee suit under § 301 for violation of its duty of fair representation. In addition, this Court has not yet determined the impact that an order compelling arbitration has on the arbitrable issue of the timeliness of the employee's grievance. The plaintiff contends that in an employee suit under § 301, an order compelling arbitration is an available remedy to the union when the arbitrable issues have been substantially resolved. Thus, the arbitrable issue of the timeliness of the employee's grievance is waived under the federal labor policy and an employer is estopped from asserting this defense to a favorable arbitration award. This is an especially important question of federal labor policy in light of this Court's most recent decisions in *DelCostello* v *International Brotherhood of Teamsters*, ___ US ___, 76 L Ed 2d 476 (1983); and *Bowen* v *United States Postal Service*, ___ US ___, 74 L Ed 2d 402 (1983).

There is currently a division of opinion in the Courts of Appeals about whether or not an employee has standing to seek judicial enforcement of a favorable

arbitration award. This Court has not yet determined the circumstances, if at all, under which an employee has standing in a judicial proceeding when the validity of an arbitration award is at issue. This is an important question of federal labor policy and is of great importance to employees, unions, and employers. In this suit, the Union neglected to take a required and necessary step within the deadlines established by the exclusive arbitration and grievance procedures and thus the plaintiff's discharge grievance expired. However, the Union had established with the employer a past practice of customary non-enforcement of contract deadlines under the procedures. The Union relied upon the established past practice with the employer when it neglected to exchange its statement within the contractual deadlines. When the Union discovered its neglect, it attempted to extend the deadlines in accordance with established past practice. However, the employer refused to abide by established past practice and enforced the contractual deadlines.

It has now been determined by the Sixth Circuit that the Union's actual reliance on the established past practice of non-enforcement of contractual deadlines is sufficient to relieve the Union from its violation of the duty of fair representation. Under the circumstances, it has been clearly established that the employer has repudiated or waived the contractual deadline procedures. Thus, if plaintiff has standing, the favorable arbitration award is perfectly valid.

There are many substantial issues raised in this Petition. The plaintiff has engaged in prolonged litigation in order to obtain the individual rights secured to him under the collective bargaining agreement. He has even obtained a favorable arbitration award on the merits of his discharge grievance. But yet, the Courts below have denied him any relief because they have

repeatedly misinterpreted the *Vaca* standards. Moreover, the Courts below have now hypocritically applied the contract exhaustion doctrine against plaintiff because the strict contract deadlines were violated, but yet excused the Union for its violation of the strict contract deadlines under the exact same set of facts.[2]

This is a case that is deserving of this Honorable Court's attention.

I.

A UNION VIOLATES ITS DUTY OF FAIR REPRESENTATION WHEN IT HAS THE EXCLUSIVE CONTRACTUAL AND LEGAL AUTHORITY TO PROCESS AN EMPLOYEE'S GRIEVANCE TO THE HIGHER STEPS OF THE GRIEVANCE PROCEDURE AND WHEN IT IS GUILTY OF PROCEDURAL NEGLIGENCE IN FAILING TO TAKE A BASIC AND REQUIRED STEP IN THE GRIEVANCE PROCEDURE AND WHEN THE UNION HAS MADE NO DECISION AS TO THE MERITS OF THE EMPLOYEE'S GRIEVANCE AND WHEN THE GRIEVANCE IS MERITORIOUS AND INVOLVES IMPORTANT INDIVIDUAL RIGHTS.

Prior to *Vaca* v *Sipes*, 386 US 171 (1967), this Court established the standards for union conduct toward employees in cases involving claims of discrimination in contract negotiations or contract modifications. *Steele* v *Louisville & Nashville R.R.*, 323 US 192 (1944), (racial discrimination in contract negotiations is impermissible); *Ford Motor Co.* v *Huffman*, 345 US 330 (1953); *Humphrey* v *Moore*, 375 US 335 (1964). (Honest and

[2] In footnote 4, the District Judge stated:

> "The unions never presented any evidence that the plant practice 'extended' the exchange deadline more than a few days. In this case, William Moon did not try to exchange plaintiff's statement with GM officials until three weeks after it was due. Thus, even if plant practice softened the strict timeliness requirement to a certain degree, plaintiff's grievance was still untimely." 519 F Supp at 897, fn. 4.

good faith union negotiations or contract modifications without any intent to discriminate against an affected group is permissible.)

In *Vaca, supra*, this Court for the first time dealt with the standards for union conduct in contract administration in handling employee grievances. *Vaca* dealt with an honest and good faith decision by the Union, albeit allegedly wrong, on the merits of an employee's grievance. In that situation, the Court stated that the standards for violation of the duty of fair representation are whether or not "a Union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 US at 190.[3]

The Court also adopted the standard that a union violates its duty of fair representation if it processes a meritorious grievance in a perfunctory fashion. 386 US at 191.

The *Oxford English Dictionary* (Oxford University Press, Oxford, Eng., 1978) defines perfunctory as follows:

> "Done in a careless or superficial manner. Slight. Careless, negligent, lit. characteristic of one whose aim is to get through or get rid of the matter."

[3] The overwhelming majority of the Circuit Courts of Appeals have held that *Vaca* represents a calculated expansion of the standards in judging a union's conduct toward an employee. 1st Circuit, *DeArroyo* v *Sindicato DeTrabajadores Packing House, AFL-CIO*, 425 F 2d 281 (1st Cir, 1970), cert. den. 400 US 877 (1970); 3rd Circuit, *Smith* v *Pittsburgh Gage & Supply Co*, 464 F 2d 870 (3rd Cir, 1972); 4th Circuit, *Griffin* v *UAW*, 469 F 2d 181 (4th Cir, 1972); 6th Circuit, *Ruzicka*; 8th Circuit, *Minnis* v *UAW*, 531 F 2d 850 (8th Cir, 1975); 9th Circuit, *Beriault* v *Local 40*, 501 F 2d 258 (9th Cir, 1974); and *Retana* v *Elevator Operators Union Local 14*, 453 F 2d 1018, 1023, n. 8 (9th Cir, 1972).

The 7th Circuit has recently stubbornly insisted that intentional misconduct is a necessary element of an unfair representation case. *Hoffman* v *Lonza*, 658 F 2d 519 (7th Cir, 1981); *Dober* v *Roadway Express*, __ F 2d __, 113 L.R.R.M. 2594 (7th Cir, May, 1983). But, cf. *Barton Brands* v *NLRB*, 529 F 2d 793 (7th Cir, 1976).

Plaintiff contends that this Court meant exactly what the Dictionary says. Specifically, in a perfunctory processing case, such as the case at bar, a union may be found guilty of unfair representation when it negligently processes an employee's grievance.

A claim of perfunctory processing involves contract administration in the handling of employee grievances when the union's substantive decision on the merits of the grievance is not at issue. It involves situations in which the processing of the grievance and the procedures employed by the union to process the grievance are being challenged.

There is almost hopeless confusion in the Courts in developing a standard for perfunctory processing situations. The *Ruzicka* Trilogy is a good example of that confusion.

In *Ruzicka I*, the Court found the Union guilty of procedural negligence in handling plaintiff's discharge grievance. The Union conduct was "a clear example of arbitrary or perfunctory handling of a grievance . . ." 523 F 2d at 310. However, Judge McCree, in the concurring opinion, disagreed. He stated that the Union conduct was not arbitrary or perfunctory because the Union conduct in the case was unintentional. Nevertheless, according to Judge McCree, the Union should be responsible for "its sheer neglect to file a paper that the employee is prevented by law [from filing for himself . . . because of] the magnitude of the injury . . . " 523 F 2d at 316.

On rehearing, the Court stated that the conduct of the Union was arbitrary. There was no mention of perfunctory conduct. 528 F 2d 912 (6th Cir, 1975).

In *Ruzicka II*, the Court explained that the "key to *Ruzicka I*" was that "unexplained union inaction" violated the arbitrary conduct standard. 649 F 2d at 1211.

Consequently, under *Ruzicka II*, a "justification or excuse" could be offered by the union to explain its inaction.

In *Ruzicka II*, the Court then analyzed the situation as one of gross negligence because there was no explanation for the union conduct, but ordinary negligence if there were an explanation for the conduct. The District Judge followed this analysis and found that the Union representative did not believe the contract deadlines were important, at least in part, because of the existence of a past practice of customary non-enforcement of contract deadlines. Under this analysis, the Union's conduct was not gross negligence. Because there was some explanation for it, the Union conduct was only ordinary negligence.

The Sixth Circuit analysis in *Ruzicka III* is faulty. The distinction between "unexplained union inaction" and "explained union inaction" is meaningless when it does not represent a decision on the merits of the grievance. What difference does it make if the union representative offers that he forgot as the explanation for his failure to act, or if the union representative offers no explanation for his failure to act? The magnitude of the harm to the employee is the same in any event.

The distinction between gross negligence and ordinary negligence is an unacceptable standard, at least when the negligence is unrelated to the union's decision on the merits of the grievance. For example, is the union guilty of gross negligence if a union representative neglected to file a timely submission because he was drunk in a bar? Or is the union guilty of only ordinary negligence if the union representative forgot to make a timely submission because he was on vacation with his family?

Moreover, the reasoning in *Ruzicka III* is contrary to a logical extension of its facts. There was an established past practice of customary non-enforcement of the

contract deadlines. Thus, the Union had more time to exchange its statement because of the past practice.[4] When the Union neglected to exchange its statement within the contractual deadline because of reliance on the past practice, why did the Union not attempt to exchange its statement within the period permitted by the past practice? In sum, the existence of a past practice makes the union conduct, ignoring both the contractual deadline and the deadline established by past practice, even more egregious.

The *Ruzicka* perfunctory processing line of cases is different from those cases involving challenges to the union's good faith and reasoned interpretation of the collective bargaining agreement; *Cronin* v *Sears*, 588 F 2d 616 (8th Cir, 1978); *Tedford* v *Peabody Coal Co*, 533 F 2d 952 (5th Cir, 1976) or cases involving challenges to the union's good faith efforts in contract negotiations; *Humphrey* v *Moore*, 375 US 335 (1964); *Ryan* v *Printing Pressmans Union*, 590 F 2d 451 (2d Cir, 1979); *Ekas* v *Carling National Breweries, Inc*, 602 F 2d 664 (4th Cir, 1979), cert. den. 444 US 1017 (1980); or involving challenges to the union's good faith and reasoned determination of the merits of the employee's grievance. *Vaca* v *Sipes*, 386 US 171 (1967); *Dill* v *Greyhound*, 435 F 2d 231 (6th Cir, 1970), cert. den. 402 US 952 (1971); *Welshons* v *Sivyer Steel Corp*, 674 F 2d 748 (8th Cir, 1982); *Bazarte* v *United Transportation Union*, 429 F 2d 868 (3rd Cir, 1970).

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[4] In footnote 4, the District Judge ignored this logical conclusion. Because the contract deadlines were waived by established past practice, the timeliness of the grievance necessarily was determined by that past practice. As noted by the District Judge, the arbitrator should have determined whether or not the grievance was timely under these circumstances. The Judge stated: "As I now interpret Count I of the Unions' cross-claim, G.M. should have been compelled to arbitrate the issue of the effect of plant practice on the enforceability of the exchange deadline." 519 F Supp at 897, fn. 4.

The *Ruzicka* perfunctory processing line of cases deals with a particular type of union conduct. In those cases, the union has failed to file the proper papers in a timely manner; *Ruzicka* v *General Motors, supra*; *Foust* v *IBEW*, 572 F 2d 710 (10th Cir, 1978), rev'd on other grounds 442 US 42 (1979); *DeArroyo* v *Sindicato DeTrabajadores Packing House*, 425 F 2d 281 (1st Cir, 1970), cert. den. 400 US 877 (1970); *Hoffman* v *Lonza*, 658 F 2d 519 (7th Cir, 1981); *Coe* v *Rubber Workers*, 571 F 2d 1349 (5th Cir, 1978), or the union has failed to advise the employee about the procedures; *Robesky* v *Quantas Empire Airways*, 573 F 2d 1082 (9th Cir, 1978); *Minnis* v *United Auto Workers*, 531 F 2d 850 (8th Cir, 1975); but see *Stephens* v *Postmaster General*, 623 F 2d 594 (9th Cir, 1980), or the union has failed to conduct a minimal investigation of the grievance; *Hines* v *Anchor Motor Freight*, 506 F 2d 1153 (6th Cir, 1974) rev'd in part 424 US 554 (1976); *Segarra* v *Sea Land Service Inc*, 581 F 2d 291 (1st Cir, 1978); *Wyatt* v *Interstate & Ocean Transport Co*, 623 F 2d 888 (4th Cir, 1980); *Hughes* v *International Brotherhood of Teamsters, Local 683*, 554 F 2d 365 (9th Cir, 1977), or the union has simply been ignorant of its minimal responsibilities as a statutory bargaining agent; *Milstead* v *International Brotherhood of Teamsters, Local 957*, 580 F 2d 232 (6th Cir, 1978); *Williams* v *Teamsters*, 625 F 2d 138 (6th Cir, 1980); *Denver Stereotypers Union* v *NLRB*, 623 F 2d 134 (10th Cir, 1980).

Plaintiff submits that when union procedures are at issue, and not the union decision on the merits of the grievance, the concept of procedural negligence is an appropriate standard to determine whether or not the union adequately processed a meritorious grievance. The adequacy of the union procedures and the exercise of due care under the circumstances are the key issues. Moreover, the reasonableness of the union action or inaction must be considered in light of the harm to the employee.

This Court has examined the adequacy of procedural safeguards afforded an employee. In *Humphrey* v *Moore*, 375 US 335 (1963), this Court considered whether or not an employee was granted a "fair hearing" in determining whether the Union fulfilled its duty of fair representation. Likewise, in *Hines* v *Anchor Motor Freight*, 424 US 554 (1976) this Court vacated an arbitration award because of Union conduct at the hearing.[5]

Procedural safeguards at the early steps of a grievance procedure should not be any less exacting than the procedural safeguards required at an arbitration hearing.

Second guessing of the union is not involved in a typical perfunctory processing situation. In *Ruzicka*, the Union never made a decision on the merits of the grievance. For example, where the union has failed to investigate the grievance, the issue is not the substantive union decision on the merits of the grievance, with or without a proper investigation. The issue is the standard of care in investigating the grievance and the union's exercise of due care in light of the standard.

Negligence is a perfectly acceptable standard under federal labor policy for determining the adequacy of a union's procedural handling of a meritorious grievance involving important individual rights. After all, damages in a duty of fair representation suit are based on fault principles. *Vaca* v *Sipes*, *supra* at 197; *Bowen* v *United States Postal Service*, *supra*.

Plaintiff submits that this Court, in *Vaca*, adopted a negligence standard when it accepted the proposition that a union owes a duty to process meritorious grievances in a non-perfunctory fashion. The lower courts have repeatedly either misinterpreted, twisted, or ignored this standard. This erroneous interpretation is especially glaring in the case at bar.

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[5] *See* also *Smith* v *Hussman Refrigerator Co*, 619 F 2d 1229 (8th Cir, 1980) (failure to provide notice of the hearing).

II.

THE SIXTH CIRCUIT APPLIED AN INCORRECT LEGAL STANDARD TO THE CLAIM THAT THE UNION ARBITRARILY NEGLECTED TO TAKE A BASIC AND REQUIRED STEP UNDER THE EXCLUSIVE GRIEVANCE AND ARBITRATION PROCEDURES. THE MOTIVE OR INTENT OF THE STATUTORY BARGAINING AGENT IN RELYING ON A PAST PRACTICE OF CUSTOMARY NON-ENFORCEMENT OF CONTRACT DEADLINES IS NOT CONTROLLING. THE EMPLOYEE IS ENTITLED TO CHALLENGE THE UNION DECISION IF IT IS WITHOUT A RATIONAL BASIS AND IS AN UNREASONED DECISION AND IS OTHERWISE TOO INSUBSTANTIAL TO SUPPORT THE UNION ACTION.

The bargaining representative, Charles Panter, neglected to file the Union statement. On this record, his action was unintentional.

Moreover, the evidence established a past practice of customary non-enforcement of contract deadlines. He was aware of the past practice. He decided to rely upon that past practice when he was handling plaintiff's grievance.[6]

In *Ruzicka III*, the Court rejected the position that in order to satisfy the arbitrary conduct standard, the Union's decision must be based on rational and relevant factors. The Court indicated that the only issue was the "motive or intent for the Union's conduct . . . " __ F 2d __, 113 L.R.R.M. 2562, 2563 (6th Cir, 1983).

> "[T]he inquiry here is not whether the union should have relied, or whether it was rational to

[6] There is literally only a scintilla of evidence to support these facts. The union representative testified that he in fact, exchanged the union statement. In 1973, the District Judge, based on a credibility determination, rejected this testimony. However, he did testify that he was not that concerned about contract deadlines. In that sense, we will reluctantly accept as fact that he made a "decision" to rely on the past practice when he neglected to exchange the union statement within the contract deadlines.

> rely, but whether the actual, substantially motivating reason for the union's *decision* not to timely present Ruzicka's discharge grievance to GM was its reliance on an established practice." (Emphasis Added) *Ruzicka* v *General Motors*, ___ F 2d ___, 113 L.R.R.M. at 2563.

Ruzicka III is in conflict with decisions from other Courts of Appeals.

In the 9th Circuit, a union decision to withdraw the employee's grievance and withhold that information from her is determined by whether or not the decision is without a rational basis or is an unreasoned decision. *Robesky* v *Quantas Empire Airways*, 573 F 2d 1082 (9th Cir, 1978). In the 10th Circuit, *Foust* v *IBEW*, 572 F 2d 710 (1978), rev. on other grounds, 442 US 42 (1979), arbitrary conduct is defined as "an act not done according to reason and judgment." *Id.* at 714. The Fifth Circuit has held that a union does not breach its duty if its decision is a rational result of the consideration of "relevant, permissible union factors which excludes the possibility of it being based on motivation such as personal animosity or political favoritism . . . " *Tedford* v *Peabody Coal Co*, 533 F 2d 952, 957 (5th Cir, 1976). The 7th Circuit has held, in *Baldini* v *Local 1095, UAW*, 581 F 2d 145 (7th Cir, 1978), that in order to avoid arbitrary conduct, a union must "make an honest, informed and reasoned decision not to proceed . . . " *Id.* at 151. Finally, the 4th Circuit, in *Griffin* v *International Union, UAW*, 469 F 2d 181 (4th Cir, 1982), stated that a union may "handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason . . . " *Id.* at 183.

In the case at bar, plaintiff challenged the Union decision to rely upon the past practice when it handled his grievance. The Union decision was not rational because the Union statement was prepared and was

ready to be exchanged with the employer within the contract deadline. This was not a soundly reasoned decision because it was too risky in light of management's dislike of the plaintiff. This was especially true given the explicit language in the contract. The plaintiff was never informed of either the past practice or the Union's decision to rely upon the past practice and ignore the contract deadline. The Union decision simply does not exclude the possibility of it being based on hostility.[7]

Lastly, the Union decision to ignore the contract deadline and rely on the past practice was simply too insubstantial a reason to justify the Union inaction.

There is, indeed, a considerable amount of confusion in the lower courts concerning the application of the arbitrary conduct standard. There is a division of authority in the courts as to whether or not the arbitrary conduct standard requires evidence of intentional misconduct. There is a further division around whether unintentional misconduct which substantially prejudices an employee's grievance must nevertheless be rational and based on a sound, reasoned union decision. This Court should settle this critical issue of federal labor policy.

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[7] The plaintiff maintains to this very day that the bargaining representative, Charles Panter, failed to process the grievance for deliberate and political reasons.

In any case, as noted above, the Union's decision to "rely" was totally unreasonable since it submitted the statement more than two weeks after the extended period (established by the plant practice) had run out. *See*, fn. 2, *supra*.

III.

THE PLAINTIFF HAS STANDING TO COMPEL ENFORCEMENT OF A FAVORABLE ARBITRATION AWARD OBTAINED ON HIS BEHALF BY THE UNION. THE INTERESTS OF THE PLAINTIFF ARE NOT ADVERSE TO THE INTERESTS OF THE UNION IN ENFORCING THE ARBITRATION AWARD. MOREOVER, UNLESS PLAINTIFF IS PERMITTED STANDING TO ENFORCE THE ARBITRATION AWARD, HE WILL SUFFER SUBSTANTIAL HARM.

The District Judge vacated the arbitration award. He held that "[w]ithout the breach, there is no grievance to arbitrate." 519 F Supp at 897.

The Union had sought enforcement of the award. However, the Union did not appeal his decision.[8] Consequently, the Sixth Circuit refused plaintiff standing to enforce the arbitration award.

> "An additional issue concerning the continuing viability of an arbitration award, originally litigated below as a union counterclaim against GM, has not been appealed by the union and is therefore not before this Court on review." __ F 2d __, 113 L.R.R.M. 2564.

This holding is in conflict with the Seventh Circuit opinion in *F. W. Woolworth* v *IBT, Local 781*, 629 F 2d 1204 (7th Cir, 1980). In *Woolworth*, the Court held that an employee could enforce the collective bargaining

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[8] The Union's position on whether or not the plaintiff could seek judicial enforcement on the favorable arbitration award was outlined on p. 7 of its Brief on Appeal in *Ruzicka III*.

> "We take no position on the merits of the issue in this Court. However, we hope that, if the Court addresses it, the result will be consistent with the reigning decision in this area, *F. W. Woolworth Co* v *IBT Local 781*, 629 F 2d 1204 (7th Cir, 1980), which held that grievants may only intervene in arbitration proceedings, and their enforcement, if their position is not contrary to that of the responsible union."

agreement with his employer even though only the union under the collective bargaining agreement could invoke arbitration.

The Court in *Woolworth* adopted the following standards to determine whether or not an employee may enforce, in a judicial proceeding, a favorable arbitration award obtained by his union.[9]

> "The factors favoring intervention by the employees in the instant case are: (1) the employees are defending, not attacking, the arbitration award, which stands as the culmination of the contractual grievance procedure, (2) the Union has taken a position in the district court in defense of the award, (3) the Union has not objected to the employees' intervention or appeal and (4) in the absence of intervention these employees lose what may be their final day in court resulting in a sharply focused perception of unfairness." 629 F 2d at 1211.

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[9] The Sixth Circuit in *Ruzicka III* completely failed in its responsibilities to articulate a rationale for its position or articulate any standards. This is especially irksome to plaintiff because the same Court in *Ruzicka I* ordered arbitration on the union's cross-claim, but not at the request of the plaintiff. *Ruzicka*, 523 F 2d at 315. Such an order is unprecedented in an unfair representation case. It may be a denial of due process since an employee under *Vaca* is entitled to a judicial determination of his claims. In any event, there are only two possible bases for this holding in *Ruzicka III*. First, the District Judge's analysis that "without the breach there is no grievance to arbitrate." 519 F Supp at 897. Second, there is no claim by the plaintiff that the union was guilty of unfair representation by failing to seek enforcement of the favorable arbitration award. However, arbitration in the case at bar occurred during the course of a judicial proceeding and was court ordered. In sum, the arbitration was not the product of collective bargaining, but rather the product of a lawsuit. Consequently, under either rationale, the plaintiff has standing.

The Second Circuit holds that an employee has standing to enforce a favorable arbitration award if there is tangible injury, such as the loss of a job. *Santos* v *Carpenters District Council*, 547 F 2d 197 (2nd Cir, 1977).

The Fifth Circuit holds that an employee lacks standing to vacate an unfavorable arbitration award. *Acuff* v *United Paper Workers*, 404 F 2d 169 (5th Cir, 1968). Likewise, in the Ninth Circuit an employee lacks standing to vacate an unfavorable arbitration award. *Andrus* v *Convoy Co*, 480 F 2d 604 (9th Cir, 1973), cert. den. 414 US 989.[10]

Some courts have rejected a narrow view of an employee's right to judicially enforce an arbitration award. In *Lee* v *Olin Mathieson Chem Corp*, 271 F Supp 635 (D.C. Va, 1967) the Court permitted an employee suit to enforce a favorable arbitration award even though there was a disagreement between the union and employer about the interpretation of the award and the matter could not be settled in negotiations. The Court focused on the harm to the employees.

[10] In a case involving uniquely personal rights, it is irrational and illogical for a court to deny standing to an employee to vacate an unfavorable arbitration award, but yet allow his union standing to vacate the unfavorable arbitration award. The same standards for standing should govern both employee and union. After all, such suits to vacate an unfavorable arbitration award are governed by this Court's "hands off" policy announced in *United Steelworkers of America* v *Enterprise Wheel and Car Corp*, 363 US 593 (1960). In addition, such suits are governed by a short statute of limitations. *United Parcel Service* v *Mitchell*, 451 US 56 (1981). At the very minimum, by allowing an employee standing in a suit to vacate an unfavorable arbitration award, this would substantially reduce the number of unfair representation claims when there is little, if any, evidence of unfair representation in the union's conduct at the arbitration hearing. The burden would not be great on the courts. After all, unlike a duty of fair representation claim, a court would simply review the arbitration award and the collective bargaining agreement under the appropriate standards. Allowing standing for such an employee suit (to vacate an unfavorable arbitration award involving uniquely personal rights) would have less of an unsettling effect on labor relations than allowing duty of fair representation suits. We recognize that there may be other legal bases to deny such a suit, but the lack of standing should not be one.

> "[T]o deny the plaintiffs standing to enforce the award under these circumstances where the defendant union, by inaction has failed to act on the award (sic) would render the award in such cases useless." 271 F Supp at 638.

Likewise, in *Central Motor Express, Inc* v *Local 89*, 407 F Supp 1217 (W.D. Ky, 1975), the Court permitted the employees to intervene in a suit brought by the union against the employer to compel enforcement of an arbitration award even though the interests of the union were adverse to those of the employees.

On the other hand, some courts have narrowly focused on the union's role as the exclusive statutory representative and have refused to allow the employees standing in judicial proceedings when the validity of an arbitration award is at issue. *See*, e.g., *DeLorto* v *UPS*, 401 F Supp 408 (D.C. Ma, 1975); *Capobianco* v *Brinks*, 543 F Supp 971 (E.D., NY, 1982); *Hadaway* v *Mountainside Transport*, 104 L.R.R.M. 2279 (D.C., Md, 1980); *Quimby* v *TWA*, 401 F Supp 137 (D.C. Pa, 1975).

In 1962, this Court held that employees have standing under § 301(a) to seek judicial protection of individual rights guaranteed under a collective bargaining agreement. *Smith* v *Evening News Ass'n*, 371 US 195 (1962). Indeed, § 301 contemplates suits by individual employees "to vindicate 'uniquely personal' rights of employees . . . " *Hines* v *Anchor Motor Freight, Inc*, 424 US 554, 562 (1976).

In the case at bar, the plaintiff's grievance, and resulting arbitration award, involve uniquely personal rights. It involves his job and his right to earn a living. It involves his right to be free from unjust disciplinary penalties.

A favorable arbitration award involving uniquely personal interests is a vested right. The union has no right to bargain it away. *See*, e.g., *Price* v *International Brotherhood of Teamsters*, 457 F 2d 605 (3rd Cir, 1972); *Elgin, J & E RY* v *Bosley*, 325 US 711 (1945) aff. on reh. 327 US 661 (1946).

Obviously, without standing to enforce the favorable arbitration award, the harm to plaintiff is substantial. Indeed, without standing, everything is lost.

This Court has not yet determined the circumstances under which an employee may seek judicial enforcement of a favorable arbitration award obtained on his behalf by the union. There is a wide range of opinion on this issue. The issue is important to employers, unions and employees. The issue should be settled.

IV.

THE ARBITRATION AWARD IS VALID BECAUSE GENER L MOTORS REPUDIATED OR WAIVED THE CONTRACT DEADLINE WHEN IT ESTABLISHED A PAST PRACTICE WITH THE UNION OF NON-ENFORCEMENT OF CONTRACT DEADLINES. CONSEQUENTLY, GENERAL MOTORS IS ESTOPPED FROM RELYING ON THE UNION'S FAILURE TO TAKE A REQUIRED AND NECESSARY STEP WITHIN THE CONTRACT DEADLINES UNDER THE CONTRACTUAL GRIEVANCE AND ARBITRATION PROCEDURES.

The District Judge found that General Motors and the Union had established a past practice of customary non-enforcement of contract deadlines. 86 L.R.R.M. at 2031. In *Ruzicka III*, the Court indicated that the "existence of a clear and definite practice of not insisting on contractual deadlines when an extension was requested has been the law of this case for over ten years." __ F 2d at __, 113 L.R.R.M. at 2563.

The District Judge vacated the arbitration award because he found there was no breach of the duty of fair representation. 519 F Supp at 897. Such a result is based upon a traditional approach to *Vaca* that an employer may defend the contractual claim by asserting that the employee has failed to exhaust the available remedies under the exclusive grievance and arbitration procedures, at least until the employee proves unfair representation.

Such an approach to the validity of the arbitration award is absolutely contrary to the basis relied upon by the District Judge and the Sixth Circuit to excuse the Union's violation of its duty of fair representation. Specifically, the Union's violation was excused because of customary non-enforcement of contract deadlines, but yet those same contract deadlines were held against the employee.[11] If the union were excused from the contract deadlines, the employee should also be excused from the contract deadlines.[12]

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[11] In the notorious footnote 4, the District Judge found that plaintiff's grievance was not arbitrable because the Union's attempt to exchange the statement three weeks after the contract deadline was untimely. He said the past practice did not "extend" the deadline this far. This analysis is contradictory. The contract deadlines were not enforced. They were waived by established past practice. Consequently, the contract deadlines ceased to exist as a factor in determining whether or not the grievance was timely. The timeliness of the grievance may only be determined by reference to the past practice in the plant.

[12] The contract deadlines operated as follows: Under Paragraph 77 of the GM-UAW National Agreement, a grievance had to be filed within three working days of the discharge. Local management was then required to render a decision on the grievance within five working days. Then, under Paragraph 77, the Shop Committee was required to appeal that decision within five working days. Finally, under Step 3 of the grievance procedure, Paragraph 37, the exchange of statements between management and the Union was required within five working days from the date of the Notice of Unadjusted Grievance. All of the deadlines could be extended by mutual agreement in writing. However, under Paragraph 34, a grievance not

(*Continued on following page*)

A violation of the duty of fair representation is not the only instance in which an employee may be excused from exhausting contractual procedures. It is well established that certain conduct of an employer may constitute a repudiation of contractual procedures. *Drake Bakeries* v *Bakery Workers*, 370 US 254, 260-263 (1962).

This Court in *Vaca* noted that an employee could be excused from contractual exhaustion under other circumstances.

> "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures . . . In such a situation (and there may, of course, be others), an employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action." 386 US at 185.

In at least one case, a Court has held that an accepted past practice in modification of the contract excuses an employee from exhausting the grievance remedies available to him under the contract. *Riley* v *Letter Carriers, Local 380*, 493 F Supp 342 (D. NJ, 1980), dismissed on other grounds, 668 F 2d 224 (3rd Cir, 1981). In *Riley*, the union did not file a grievance on behalf of the employee because of the existence of a past practice with the employer of holding the grievance procedures in abeyance.

(Continued from preceding page)

appealed from a decision at one step of the grievance procedure to the next step was considered settled on the basis of the last decision. And, under Paragraph 53, such settlement was considered final and binding on the Union, employer, and employee. When the Union neglected to exchange the statement, the grievance was considered "settled" and, by the operation of the contractual deadlines, settlement was considered "final."

The circumstances under which an employee will be excused from the exclusive grievance and arbitration procedures in the absence of unfair representation is an important question under the federal labor law. This Court has never decided this issue.

Plaintiff has conclusively established that he was subject to an unjust discharge in violation of the contract. But yet, the Courts in *Ruzicka* have blindly ignored the fact that the contract deadlines were waived by past practice. Nevertheless, these Courts have willingly excused the Union because those contract deadlines were waived by the same past practice.

This is a terrible form of judicial hypocrisy and defeats the very basic principle that individual rights in a collective bargaining agreement can be judicially protected.

V.

THE ARBITRATION AWARD IS VALID BECAUSE IT WAS OBTAINED BY THE UNION IN ITS CLAIM TO COMPEL ARBITRATION. UNDER FEDERAL LABOR POLICY, THE UNTIMELINESS OF A GRIEVANCE IS WAIVED WHENEVER, IN A DUTY OF FAIR REPRESENTATION SUIT, AN ORDER IS OBTAINED COMPELLING ARBITRATION OF THE EMPLOYEE'S GRIEVANCE AND CONSEQUENTLY, THE EMPLOYER IS ESTOPPED FROM ASSERTING UNTIMELINESS OF THE GRIEVANCE.

The Union sought in this suit to compel arbitration on the plaintiff's grievance. In *Ruzicka I*, the Sixth Circuit granted summary judgment on the Union's cross-claim for arbitration. 523 F 2d at 315.

This Court in *Vaca* stated that an order compelling arbitration was an available remedy in a duty of fair representation suit.

> "It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged failure to afford him his contractual remedy of arbitration. For this reason, an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved." *Vaca*, 386 US at 196.

This Court noted that "the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy." 386 US at 196. In that situation, a Court could decide the contractual claim or enter an order compelling arbitration.

However, this Court has never determined the circumstances under which a union, in a duty of fair representation suit, may obtain an order compelling arbitration of the employee's grievance. Moreover, this Court has never determined whether or not such an order compelling arbitration operates to estop the employer from asserting that the grievance is untimely under the collective bargaining agreement.

Plaintiff submits that this Court in *Vaca* contemplated and decided those issues in a situation in which the *employee* obtains an order compelling arbitration. In particular, when an employee obtains an order compelling arbitration, there is a waiver of any untimeliness of the employee's grievance and the employer is estopped from asserting that the grievance is untimely under the grievance and arbitration procedures of a collective bargaining agreement.

A simple example will illustrate this. An employee files a duty of fair representation suit against the union and employer after the union withdraws his grievance without having submitted the grievance to arbitration. Under the exclusive grievance and arbitration procedures, the union's withdrawal of the grievance constitutes a final and binding settlement of the grievance on the employer, union and employee. The

grievance and arbitration procedures contain four steps, the final step being binding arbitration, and timely filing of papers is required in order to appeal to higher stages. The employee establishes unfair representation and seeks an order to compel arbitration. At that point, the grievance under the procedures is untimely.

May the employer refuse to arbitrate because the grievance is untimely? Or, if the grievance is arbitrated, may the employer refuse to abide by an arbitration award favorable to the employee because the grievance was untimely and thus not arbitrable?

The answer under *Vaca* is that the employer may not assert such a defense. Under such circumstances, the failure to exhaust contract remedies in a timely manner is not a defense to arbitration, nor an arbitration award. Were it otherwise, an order to arbitrate, in all probability, would never be an available remedy to an employee.[13]

A waiver of the arbitrable issue of the timeliness operates because, under federal labor policy, Congress never "intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." *Vaca*, 386 US at 186.

Plaintiff submits that the arbitrable issue of the timeliness of the grievance is also waived when the union, in a duty of fair representation suit, obtains an order compelling arbitration. A union, after a duty of fair

[13] This Court in *Vaca* surely did not intend to restrict the employee to a judicial determination on the contract claim rather than arbitration. As noted in *Ruzicka I*, the employee may prefer arbitration. An employee who, for example, shows up drunk on the job may believe that an arbitrator, familiar with shop law, might be better than a judge or a jury. The point is, an employee can select a remedy and, if he selects arbitration, there is an automatic waiver of the issue of the timeliness of the grievance, at least in those instances in which the grievance was settled short of arbitration and, when the order is obtained, the grievance is obviously untimely under the procedures.

representation suit is filed, should be encouraged to seek arbitration of the employee's grievance.

A duty of fair representation suit must be filed within six months. *DelCostello* v *International Brotherhood of Teamsters*, __ US __; 76 L Ed 2d 476 (1983). The union is liable for back pay occurring after the normally scheduled arbitration hearing date. *Bowen* v *United States Postal Service*, __ US __; 74 L Ed 2d 402 (1983).

In the case at bar, arbitration was ordered when the arbitrable issues were "substantially resolved." An early determination on the merits of plaintiff's discharge grievance was to the benefit of all the parties.

In light of the recent decisions by this Court, unions should have a great interest on seeking arbitration as quickly as possible. Protracted litigation simply exposes unions to greater liability. Consequently, this Court should indicate that arbitration is an available remedy to the union in a duty of fair representation suit whenever the arbitrable issues are substantially resolved in the course of litigating the fair representation claim against the union.

In that instance, the employee should receive the benefit of a favorable arbitration award even if it is later determined in the litigation that the union did not violate its duty. The employer should therefore be estopped from raising the untimeliness of the grievance as a defense to the favorable arbitration award.[14]

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[14] In *Ruzicka I*, the Court ordered arbitration on both the substantive and procedural aspects of plaintiff's grievance. 523 F 2d at 315. However, the Sixth Circuit's rationale in submitting the procedural aspects of the grievance was eliminated by this Court's opinion in *Hines*. Moreover, in *Ruzicka I*, the plaintiff had not yet "proved" unfair representation. The Court reversed a Rule 41(b) dismissal by the District Judge. The plaintiff had only established a prima facie case. *Ruzicka II*, 649 F 2d at 1209. Nevertheless, the Sixth Circuit order compelling arbitration is valid on the theory that the arbitrable issue of the timeliness of the grievance was substantially resolved. Thus, the arbitration order and award remain valid.

CONCLUSION

We respectfully submit that the rulings of the Sixth Circuit below are internally inconsistent and contrary to federal labor law and policy. The final disposition of the case by the Court of Appeals represents a callous indifference to the substantial and important individual rights of the plaintiff. In depriving him of these rights, which he has sought to enforce for twelve years, the Court has shirked its responsibility to develop a sound, reasoned labor law in accordance with the principles enunciated by this Court.

In a broader sense, this case typifies the confusion and uncertainty existing in all the Circuits with respect to § 301 fair representation cases. The diversity of judicial opinion in this area is the product, at least in part, of the vagueness of the standards enunciated by this Court in *Vaca*. Specifically, the standards of "arbitrary conduct" and "perfunctory processing" have yielded wildly inconsistent results in the lower courts. The present case offers this Court a perfect opportunity to clear up this confusion and provide some consistency and predictability to this important area of federal labor law.

Respectfully submitted,

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COUNSEL FOR PETITIONER

Dated: August 19, 1983

PETITIONER'S APPENDIX

MEMORANDUM OPINION DENYING MOTION TO DISMISS

(United States District Court
Eastern District of Michigan
Southern Division)

(January 20, 1972)

(William Ruzicka, Plaintiff, vs. General Motors Corporation, a Delaware corporation, International Union, United Auto Workers (UAW), Local Union 166, UAW, jointly and severally, Defendants — Civil Action No. 36598)

Plaintiff in this action is William Ruzicka, a former employee of General Motors Corporation. Defendants are General Motors Corporation and the UAW. On March 31, 1970, he was fired by General Motors for being drunk on the job and for using abusive language to a management employee. Ruzicka filed a written grievance, protesting his discharge, which proceeded through steps one and two of the grievance procedure but was not appealed to the third and fourth steps. Plaintiff claims that he notified his Shop Committeeman to continue processing his grievance but that he (a man Panter, by name) failed to do so because of personal hostility towards Ruzicka.

Plaintiff alleges that the decision of management was contrary to consistent rulings of impartial umpires in that the correct disciplinary action should have been a temporary suspension. Therefore, plaintiff sued General Motors Corporation for breach of contract, claiming an improper discharge. He may maintain this, only if the defendant UAW breached its duty of fair representation.

Plaintiff's suit against his union, the UAW, is based on that claimed breach of the union's duty of fair representation. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Plaintiff alleges that he had "lost favor" with his union and that the local union's Shop Committeeman was hostile towards him and therefore failed to process plaintiff's grievance to the third and fourth stages.

General Motors Corporation has filed a motion to dismiss based on the fact that plaintiff failed to complete the grievance procedures pursuant to the collective bargaining agreement. Since plaintiff's claim against General Motors is based on breach of contract, contract law indicates that plaintiff must comply with the contract terms.

> " . . . [I]f the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967).

An exception to this rule arises if the union has sole power to invoke the higher stages of the grievance procedure, and the plaintiff (as is alleged here) is prevented from exhausting grievance procedures by the union's wrongful refusal to process the grievance. *Vaca* v. *Sipes*, *supra* at 185. The court further stated:

> "For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in the handling of the employee's grievance." *Supra* at 186.

Thus the validity of defendant General Motors' defense of failure to complete the grievance procedures depends upon whether the UAW breached its duty of fair representation.

The rationale for permitting the plaintiff to proceed where the union has breached its duty of fair representation is that otherwise the employee is remediless — abandoned by his union and fired by his company. It does no injury to the company to allow him to proceed, since plaintiff alleges that they have discharged him wrongfully and that his failure to perform his own contract obligations is not attributable to him. *Richardson* v. *Communications Workers of America*, 267 F.Supp. 403 (D.Neb. 1967).

Thus plaintiff must be able to show first that the defendant union breached its duty of fair representation.

In this district some cases indicate that plaintiff must show that he has exhausted or attempted to exhaust his internal remedies against the union before he can proceed against it in court. In *Harrington* v. *Chrysler Corporation*, 303 F.Supp. 495 (E.D. Mich. 1969, Kaess, J.), plaintiff failed to completely exhaust his contract grievance procedure and his intra-union appeal procedure set forth in Article 32 of the UAW Constitution. Judge Kaess stated:

> " . . . plaintiff . . . sought redress only by means of the grievance machinery set forth in the local collective bargaining agreement between Local Union No. 402 and Chrysler Corporation. He did not avail himself of the intra-union appeal procedures to challenge Local 412's alleged arbitrary action in refusing to represent the plaintiff with respect to the grievance. The [UAW Const.] require[s] the aggrieved member to submit his appeal in writing within a specified time period . . . and all remedies and appeals . . . [must] be exhausted prior to [resort to court].
>
> "Thus, based upon plaintiff's . . . failure to affirmatively show *some* action pursuant to the intra-union appellate procedures, this court is without authority to entertain the plaintiff's action." *Supra* at 497. (Emphasis added.)

See also *Imbrunne* v. *Chrysler Corporation*, — F.Supp. — 65 CCHLC ¶ 11,745 (E.D. Mich., April 26, 1971, Civil Action No. 36112). (Plaintiff's action barred because he failed to exhaust his grievance procedure and the union's action was not so arbitrary so as to constitute unfair representation.)

Anderson v. *Ford Motor Company*, 319 F.Supp. 134 (E.D. Mich. 1970), relies upon *Bsharah* v. *Eltra Corporation*, 394 F.2d 502, 503 (6th Cir. 1968), and the Circuit Court there stated that where plaintiff "failed to allege or show any attempt to initiate her intra-union remedies prescribed by the [UAW Constitution and bylaws] . . . " it would affirm the district court's dismissal of her claim. Chief Judge Freeman in *Anderson*, in reliance upon this language, held that plaintiff employees must completely exhaust their intra-union remedy before resort to federal court. The above-mentioned district court cases are

uniform in their extension of the obligation to exhaust intra-union remedies beyond that enunciated in the decisions of the Sixth Circuit.

In the instant case, plaintiff Ruzicka has spent approximately one year prior to suit in an attempt to pursue his intra-union remedy. He is still attempting to proceed within the union. While a privately administered system for the redress of employee grievances is an integral part of our national labor relations policy of settling disputes without the necessity of judicial resolution, it should not operate to deprive an employee of his access to the federal courts under Section 301 (unless he has failed to substantially exhaust his remedies under that system). I hold there has been sufficient exhaustion in this case.

The UAW also argues in support of its motion that plaintiff has not pleaded sufficient facts to establish that the UAW acted in bad faith or with hostile or arbitrary discrimination.

In *Balowski* v. *International Union*, 372 F.2d 829 (6th Cir. 1967), the court stated:

> "The allegations of a complaint alleging the breach of a Union's duty of fair representation must contain more than 'conclusory statements alleging discrimination.' In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination.' " At 835.

In the instant case, plaintiff has made a sufficient allegation of bad faith to comply with the Federal Rules of Civil Procedure.

Ruzicka, before the commencement of this lawsuit, brought charges against the union before the National

Labor Relations Board. On October 9, 1970, the Regional Director refused to issue a complaint. In December this refusal was affirmed by the General Counsel of the National Labor Relations Board. There is no appeal, either administrative or judicial, from such a decision. *United Electrical Contractors Ass'n.* v. *Ordman*, 366 F.2d 776 (2nd Cir. 1966). The UAW argues that this refusal should be res judicata or collaterally estop the plaintiff from proceeding in this court.

While the issue before this court is identical to that before the National Labor Relations Board, it is clear that res judicata does not attach to the refusal to issue a complaint. The nature of such a decision is tentative. The Board itself is not bound by such a decision. *Maxwell Co.* v. *NLRB*, 414 F.2d 477 (6th Cir. 1969). See also *NLRB* v. *Zimnox Coal Co.*, 336 F.2d 516 (6th Cir. 1964). The refusal to issue a complaint is not res judicata, *NLRB* v. *Baltimore Transit Co.*, 140 F.2d 51 (4th Cir. 1944), cert. denied 321 U.S. 795 (1944), because it is not final. Furthermore, the traditional elements of res judicata are not present. There is no opportunity by the charging parties to actually litigate the matter. Therefore, neither res judicata nor collateral estoppel applies.

As to the final contention by the UAW concerning Panter's authority to act for the International Union, this involves questions of fact so is best reserved for trial.

The motion to dismiss brought by defendant General Motors is also dened for the above reasons. An appropriate order may be presented.

/s/ John Feikens
United States District Judge

Dated: January 19, 1972
Detroit, Michigan

MEMORANDUM OPINION AND ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(April 25, 1973)

(William Ruzicka, Plaintiff, vs. General Motors Corporation, a Delaware corporation; International Union, United Auto Workers, (UAW); Local Union 166, Jointly and Severally, Defendants — Civil Action No. 36598)

Defendant Unions (International Union, UAW, and Local Union 166, UAW) and defendant General Motors Corporation (General Motors) bring motions for summary judgment against plaintiff, William Ruzicka. Motions for summary judgment have also been brought by each defendant against the other defendant. A hearing was held on the motions brought by defendants against the plaintiff. Argument on the motions between defendants has been adjourned until the close of plaintiff's case at trial.

This court must now determine whether Ruzicka has had "his day in court" in the union forums. If so, summary judgment should be granted.

It is noteworthy that all but one of the intra-union hearings and decisions occurred prior to this court's Opinion of January 20, 1972; the local union had declined to hold a trial to decide the question of Panter's misconduct, the International Executive Board (IEB) affirmed, but the Public Review Board (PRB) reversed and ordered a trial. In that trial Panter was found "not guilty" and the IEB affirmed. On June 8, 1972, the PRB dismissed the appeal from the IEB, stating that "under the [UAW] Constitution no appeal from the verdict of

not guilty can be had." The Board, however, did indicate its agreements on the merits with the IEB decision.

At the trial, at which Panter was adjudicated "not guilty" of "consciously and purposely intending to allow [Ruzicka's] grievance to expire," proof "beyond a reasonable doubt" as a standard was employed. Although Article 31 of the UAW Constitution prescribes no particular standard of proof for a local union trial, the IEB, in affirming the trial decision in this case, stated:

> " . . . there is no evidence of any kind to indicate *beyond a reasonable doubt* that [Panter's] failure to secure management's statements was motivated by personal and political differences . . . ." (Emphasis added.)

Thus, assuming *arguendo* that Panter's "guilt" is a dispositive issue in the instant case, plaintiff's burden of proof in the union forum was much greater than it would be in this court. Judicial deference to internal union proceedings is commendable but inapplicable to the facts at bar. In *Charron* v. *American Federation of State, County and Municipal Employees Union*, 470 F.2d 156 (6th Cir. 1972), the plaintiff had been discharged by his union; in *Vestal* v. *Hoffa*, 451 F.2d 706 (6th Cir. 1971), the dispute was over interpretation of the union constitution. Both the *Vestal* and *Charron* cases arose under the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. §§ 401 *et seq.*). This Act expressly defines what is an adequate union disciplinary proceeding. 29 U.S.C. § 411(a)(5). The instant case arises under the Labor Management Relations Act of 1947 (29 U.S.C. §§ 141 *et seq.*). Where, as here, plaintiff's burden of proof was heavier in the union forum than in the federal courts, this court does not believe that deference to the internal union adjudication is required. On the facts and the law, the *Charron* and *Vestal* cases are distinguishable, and this court declines to follow them here.

The unions' remaining grounds for summary judgment are without merit. First, defendant unions now express a willingness to press Ruzicka's claim and say only General Motors' refusal bars this alleged remedy. Thus, the unions contend they cannot be considered wrongdoers and must be dismissed out of the case. This union attitude was manifest well before this court's January 1972 Opinion. More important, it cannot be said that, as a matter of law, the present union position purges the unions of their alleged misconduct which began shortly after Ruzicka's discharge in March 1970. The unions' argument is best made to the trier of fact, for the jury must "apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967).

The unions' argument that Panter acted beyond the scope of his authority thus obviating any union misconduct must also be rejected. As this court said in its January 20, 1972, Opinion: "Panter's authority to act for the International Union, . . . involves questions of fact . . . best reserved for trial." The unions say that since this court's decision, Ruzicka stated in deposition that Panter "acted contrary to [his] duties and authority as unit chairman" and that this statement is binding against Ruzicka. This court does not agree that such a statement resolves the factual question of Panter's authority and as to this ground, therefore, the unions' motion for summary judgment is also denied.

Similarly, this court has already decided in its January 20, 1972, Opinion that there has been sufficient exhaustion and that the National Labor Relations Board's refusal to issue a complaint is no bar to this suit.

Finally, this court rejects the unions' contention that no genuine issue of material fact remains for decision. It

may be that the lengthy history of this matter has eliminated many factual issues. The events surrounding the discharge and the subsequent attempts to reverse that decision have been thoroughly explored in numerous depositions. Yet one fundamental fact remains uncertain — whether Panter unfairly represented Ruzicka because of personal hostility. Inferences could be drawn from facts which might lead a jury to conclude that Panter acted in bad faith when he failed to process Ruzicka's grievance. Circumstantial evidence might play a role in the jury's decision. In sum, notwithstanding the affidavits and depositions presented to this court, it cannot be said that, as a matter of law, the issue of bad faith is resolved in defendants' favor. See *Neust* v. *Westinghouse Air Brake Co.*, 313 F.Supp. 1228 (S.D.Ill. 1970); *Rivera* v. *NMU Pension & Welfare & Vacation Plan*, 288 F.Supp. 874 (E.D.La. 1968).

General Motors' motion for summary judgment must also be denied. General Motors says plaintiff's allegation that his punishment was unduly harsh is a claim for which no relief may be granted, since the sanction of discharge is clearly allowed under the national collective bargaining agreement. But the question is whether imposition of the discharge sanction in Ruzicka's case constituted a breach of contract by General Motors and this must be decided on the particular facts of this case.

Accordingly, for the reasons set forth in this Opinion,

It Is Ordered that defendants' motions for summary judgment against plaintiff be, and the same are, hereby Denied.

This case must be tried to a jury, and it will commence on Tuesday, August 7, 1973, at 9:00 A.M.

/s/ John Feikens
United States District Judge

Dated: Detroit, Michigan, April 25, 1973.

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(November 21, 1973)

(William Ruzicka, Plaintiff, vs. General Motors Corporation, a Delaware corporation; International Union, United Automobile Workers (UAW); Local Union 166, UAW, Jointly and Severally, Defendants — Civil Action No. 36598)

William Ruzicka filed this suit under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Against the General Motors Corporation, the plaintiff alleged wrongful discharge in violation of his union agreement. Against the United Auto Workers, the plaintiff alleged breach of its duty of fair representation for failure to exchange the statements of unadjusted grievance at the third step of the grievance procedure.

In a prior opinion,[1] the court denied the defendants' motions to dismiss. The court held that the plaintiff had exhausted his contractual remedies, and the decision of the National Labor Relations Board not to issue a complaint was not res judicata with respect to the issues raised in the complaint in this case.

In an unreported opinion dated April 25, 1973, the court denied the defendants' motions for summary judgment. The court held that deference to intra-union proceedings was inappropriate because in that proceeding the plaintiff had to show the "guilt" beyond a reasonable doubt of the union official (Charles Panter) in mishandling his grievance, a standard higher than that applicable in court. The court held that the plaintiff

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[1] *Ruzicka* v. *General Motors Corp.*, 336 F.Supp. 842 (E.D. Mich. 1972).

must have his day to prove his allegation that Panter and the union had breached the duty of fair representation in the processing of his grievance.

Plaintiff has now presented his proof. Before the court for decision are the defendants' motions to dismiss under Rule 41(b), Fed.R.Civ.P.

Rule 41(b) authorizes a court in a case such as this to dismiss an action on the ground that upon the facts and the law, the plaintiff has shown no right to relief. As construed in *Bach* v. *Friden Calculating Mach. Co.*, 148 F.2d 407 (6th Cir. 1945), this rule authorizes a court to weigh the evidence and draw inferences therefrom. See also, 5 Moore's Federal Practice, ¶ 41.13[4].

On March 31, 1970, Ruzicka was discharged by General Motors for being intoxicated on the job and for using threatening and abusive language to his superiors. Ruzicka filed a timely grievance protesting his discharge and the company responded with a timely paragraph 77 answer.[2] Later the union filed a timely "notice of unadjusted grievance" to initiate the third step of the grievance procedure. Paragraph 37 of the national agreement then provides for a simultaneous exchange of "statements of unadjusted grievance". After two mutually agreed upon extensions of the time allowed for this in the national contract, an exchange date of May 5, 1970 was fixed.

However, no *simultaneous* exchange was ever made in Ruzicka's case. The exchange was to be made on behalf of Ruzicka and the union by Charles Panter, chairman of the shop committee, and on behalf of the company by Ross Hagerman, supervisor of labor relations at Ruzicka's plant.

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[2] This has reference to paragraph 77 of the national agreement then in force between the company and the union.

The witnesses disagreed in their testimony as to whether Panter *ever* gave management the union statement of unadjusted grievance. Both Hagerman and Jerry Bennett, a labor analyst and subordinate to Hagerman, testified that Panter never did make the exchange. Hagerman also testified that it was the practice to make a simultaneous exchange of the statements in his office, as required by the contract. If one side was not prepared with its statement on an exchange date, extensions of time it appeared were freely granted. In fact such extensions were freely granted even after an exchange date had passed. This testimony was corroborated by William Moon, who succeeded Charles Panter as chairman of the shop committee on May 17, 1970.

Panter, on the other hand, testified that he did give the union's statement of Ruzicka's unadjusted grievance to management during the first week in May, although he did not remember the date.[3] He stated that the common practice was for management to leave its statement in his mailbox at the plant two to four days after receipt of the union statement, to allow a period for negotiating the grievance. Panter said he never saw management's statement.

After Moon replaced Panter, and following general review with Panter of the active grievance files, Moon attempted to exchange the Ruzicka statement on May 26, 1970. This was rejected by management as untimely. Thereafter Ruzicka learned that his grievance was dead.

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[3] He said he had a specific recollection of this because an associate of his read it aloud in the meeting at which he gave the statement to management.

The court concludes that the weight of the evidence is that Panter did not make the exchange. While he so testified, there was substantial credible evidence to the contrary. Hagerman and Bennett, the company representatives involved in Ruzicka's case, testified that Panter never made the exchange. No union statement was ever found in company files,[4] or in the files of the international union. Of significance is the fact that Moon, when he became shop committee chairman, had the statement of unadjusted grievance (multiple copies) and then tried to make the exchange.

The fact that Panter did not make the exchange, standing alone, does not show breach of the union's duty of fair representation. The landmark decision defining this duty is *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Therein it is stated at 177:

> "It is now well established that, as the exclusive bargaining representative of the employees in [a particular] bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement . . . . Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967).

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[4] Also, only Panter testified that the practice was not to make simultaneous exchanges. Hagerman, Bennett and Moon stated the exchanges were simultaneous. This practice, coupled with the fact that no management statement was ever given to the union, indicates that no union statement was ever given to management.

The employee's right to fair representation does not include an absolute right to have a grievance taken to arbitration, even if it is ultimately shown to be meritorious. If the union's conduct is not improperly motivated and is within the bounds of rationality, the fact that it may "unfairly" work a hardship on one employee is not enough to require condemnation. The duty of fair representation is breached only when the union's conduct is "arbitrary, discriminatory, or in bad faith". *Vaca* v. *Sipes, supra*, 386 U.S. at 190. There must be "substantial evidence of fraud, deceitful action or dishonest conduct", *Humphrey* v. *Moore*, 375 U.S. 335, 348 (1964), or of "discrimination that is intentional, severe, and unrelated to legitimate union objectives". *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 301 (1971). To insure that the salutary purposes of the pre-emption doctrine are not subverted by excluding unfair representation suits from its purview, the distinction "between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained". *Lockridge, supra*, 403 U.S. at 301.

The court finds that the plaintiff has not shown a right to relief under the standards announced in *Vaca*, *Humphrey* and *Lockridge*. Plaintiff testified to some hostility between himself and Panter. They had openly disagreed in matters relating to the conduct of union affairs, and they had run against each other in several union elections.[5]

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[5] In addition, one Charles Brown testified that Panter told him in a bar one night after Ruzicka's discharge that as long as he (Panter) was shop chairman, Ruzicka would not get back to work. The court is inclined to give this testimony very little weight, primarily because of the circumstances under which the incriminating remark was made.

Nonetheless, this evidence is insufficient and plaintiff may not prevail. Plaintiff introduced no direct evidence indicating that whatever hostility existed between them tainted Panter's processing of the grievance, and the court, as the finder of facts, cannot infer the necessary causation from the mere fact that there was some hostility.[6]

Plaintiff asks the court to attach substantial weight to the fact that Panter thought the grievance had some merit. But, as noted above, *Vaca* teaches that an employee does not have a right to have even meritorious grievances pressed by the union. The employee's right is the right to representation by his union free of bad faith, arbitrariness or discrimination.

Thus the court makes the following findings of fact:

1. Panter did not make the exchange or unadjusted grievance by May 5, 1970, the due date.

2. There existed, during the time when Ruzicka's grievance was in process, some hostility between Panter and Ruzicka.

3. But there was no showing in the case that that hostility tainted Panter's processing of the grievance.

4. Panter neglected to file a timely statement of unadjusted grievance.

The court makes the following conclusions of law:

1. Under the cases, in order to prove a breach of the

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[6] The court noted with interest plaintiff's failure to call Panter as a witness to find out what effect, if any, the hostility had on his processing of the grievance. Panter was called at the direction of the court.

duty of fair representation, the plaintiff must show that the union's conduct was arbitrary, discriminatory or in bad faith.

2. Mere hostility between the plaintiff and the union official is insufficient to show a breach; the plaintiff must show that the hostility tainted the official's conduct.

3. Accordingly, the court concludes that the defendant union did not unfairly represent Ruzicka in the proceedings.

A final word: William Ruzicka has now had his day in court. It would have been better if he had been given this opportunity at a much earlier time. No prior hearing addressed this basic question: was he fairly dealt with by his union? This court finds no breach by his union of the duty of fair representation. If there was any unfairness, it was that Ruzicka had to go to so many other tribunals before he could get this basic question answered. In the developing law of labor relations this point must not be overlooked.

Plaintiff has failed to show a basis upon which relief may be granted. Accordingly, his complaint must fail and this action must be dismissed.

An appropriate order may be submitted.

/s/ John Feikens
United States District Judge

Dated: Detroit, Michigan
November 21, 1973

OPINION

(United States Court of Appeals
for the Sixth Circuit)
(Decided and Filed September 23, 1975)

(William Ruzicka, Plaintiff-Appellant, and Cross-Appellee, v. General Motors Corporation, a Delaware Corporation, International Union, UAW, and Local Union 166, UAW, Defendants-Appellees, and Cross-Appellants. Appeal from the United States District Court for the Eastern District of Michigan, Southern Division — Nos. 74-1939, 74-1940, 74-1941)

Before: Weick, Celebrezze, and McCree, Circuit Judges.

Celebrezze, Circuit Judge, delivered the opinion of the Court, in which Weick, Circuit Judge, joined. McCree, Circuit Judge, (pp. 17-18) filed a separate concurring opinion.

CELEBREZZE, Circuit Judge

We consider an appeal and two cross-appeals from a District Court's judgment that Appellee Unions did not breach their duty of fair representation towards Appellant, a former employee of Appellee General Motors Corporation (GM). Appellant asks that this conclusion be reversed and that his action against the Unions and GM be reinstated. GM argues that alternative grounds exist for dismissing it from the case. The Unions also assert al- (2) ternative grounds for dismissal and argue that their cross-claim to send Appellant's grievance to arbitration should have been granted. The arguments raise several significant issues concerning an individual employee's right to fair treatment from his Union, as well as the relationship of arbitration procedures and judicial recourse for aggrieved persons.

On March 31, 1970, Appellant William Ruzicka was discharged for being intoxicated on the job and using threatening and abusive language towards his superiors at GM's Willow Run Plan (sic) in Ypsilanti, Michigan. Appellant had worked there for nearly eleven years and had been actively involved in Union activities for much of that time.

Appellant initiated the grievance process under the National Agreement between GM and the United Auto Workers by filing a timely grievance protesting his discharge. He did not dispute the essential facts of intoxication and abusive language, but argued that discharge was an unduly harsh penalty which was inconsistent with past decisions of umpires interpreting the National Agreement. The Company completed the second step of the grievance process by filing an answer under Paragraph 77 of the National Agreement. The Union began the third step by filing a "notice of unadjusted grievance." To invoke arbitration, the Union was required by Paragraph 37 to file a "statement of unadjusted grievance" simultaneously with GM. The District Court found that Local 166 never filed such a statement, although it had sought and received two time extensions to do so. After the due date for the statement had passed, GM disclaimed further obligation under the National Agreement.

Appellant immediately pursued his intra-Union remedies under Article 31 of the UAW Constitution. Appellant argued that Charles Panter, a Local 166 official, had willfully failed to perform his duty in failing to file the required statement. A trial before a Local 166 Committee resulted in a finding that Panter had been negligent but not guilty of willful inaction. Appeals to higher levels failed.

(3) Appellant also filed charges with the National Labor Relations Board, which investigated but dismissed them.

Appellant instituted further intra-Union action against Local 166 for wrongful processing of his grievance, but this action was unsuccessful at the Local level. An appeal to higher levels was stayed pending resolution of a policy grievance that Panter's successor at Local 166 had filed. The policy grievance, which requested GM's consideration of Appellant's grievance despite the procedural problem, was withdrawn by Local 166 on April 24, 1971.

Rather than appeal the adverse decision on Local 166's processing of the grievance to the UAW's International Executive Board, Appellant filed a complaint in federal court on June 3, 1971. He alleged that Panter's personal "hostility" towards him had caused Panter not to file the statement of unadjusted grievance. He asserted that both the Local and International Unions had thus given him unfair representation, and he alleged that GM's discharge was wrongful and that GM had conspired to discharge him because of his Union activities.

The Unions filed a cross-claim against GM, seeking that the dispute be ordered to arbitration. After denying various pre-trial motions, the District Court conducted a hearing limited to the question of unfair representation. It concluded that there was no unfair representation because Panter had merely "neglected" to file the required statement. The Court reasoned, "Mere hostility between the plaintiff and the union official is insufficient to show a breach [of the duty of fair representation under 29 U.S.C. § 157 (1970)]; the plaintiff must show that the hostility tainted the official's conduct." Since "there was no showing in the case that hostility tainted Panter's processing of the grievance," Appellant's complaint was dismissed, along with the Unions' cross-claim.

We will first consider the question of unfair representation, for if the District Court's conclusion was correct, the action against both the Unions and GM must fail. *See Vaca* v. *Sipes*, (4) 386 U.S. 171 (1967). If the District Court erred, there remain for consideration the Unions' and GM's arguments that alternative grounds exist for dismissal. Finally, we must address the Unions' contention that their cross-claim to have Appellant's grievance ordered to arbitration was wrongfully dismissed.

Proof of unfair representation by a Union depends on a showing that "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). A review of Appellant's complaint and the facts developed at trial convince us that Appellant did not prove that officials of Appellee International Union had acted arbitrarily, discriminatorily, or in bad faith. In *Hines* v. *Local 377*, 506 F.2d 1153, 1157 (6th Cir. 1974), *cert. granted and limited to other ground*, 43 U.S.L.W. 3571 (Apr. 21, 1975), we stated:

> There was no claim that the local union was acting for or at the direction of the International, and appellant Hines, when asked on deposition what steps the International failed to take in investigating the company's charges replied: "I don't know of any steps that they should or should not have taken." Since there was no genuine issue as to a material fact about the conduct of the International Union, the grant of summary judgment was proper.

The *Hines* reasoning applies here, and we affirm the District Court's finding of no unfair representation by the International Union. We turn now to consideration of the liability, if any, of Local 166.

As discussed above, the District Court concluded that Local 166 had not unfairly represented Appellant because Agent Panter had merely "neglected" to file the required Statement of Unadjusted Grievance and had not acted in bad faith. Appellee Local urges that this conclusion be upheld, asserting (5) that bad faith is an essential element of any claim of unfair representation.

We do not find the duty of fair representation so limited. In *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967), the Supreme Court held that union actions which are "arbitrary, discriminatory, *or* in bad faith" (emphasis added) could establish a breach of the duty of fair representation. As we held in *St. Clair* v. *Local 515*, 422 F.2d 128, 130 (6th Cir. 1969),

> The phrase "fair representation" is something of a term of art, and the standards by which we are bound have not been set down explicitly in a code. However, the Supreme Court has spoken clearly enough to guide us here. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The Court there held that the duty of fair representation does not require a union to exhaust every theoretically available procedure simply on the demand of a union member. 386 U.S. at 192. . . . However, the ignoring or the perfunctory processing of a grievance may violate the duty of fair representation. Vaca v. Sipes, 386 U.S. at 194.

We agree with the Fourth Circuit's analysis of the three-pronged standard established in *Vaca* for determining whether a union has unfairly represented on (sic) of its members:

> A union must conform its behavior to each of these three separate standards. First, it must treat

> all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

Griffin v. *International Union of United Automobile Workers*, 469 F.2d 181, 183 (4th Cir. 1974). *See also De Arroyo* v. (6) *Sindicato De Trabajadores Packinghouse, AFL-CIO*, 452 F.2d 281 (1st Cir.) *cert. denied*, 400 U.S. 877 (1970).[1]

We believe that the District Court misread *Vaca* when it held that "bad faith" must be read into the separate and independent standards of "arbitrary" or "discriminatory" treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation.

In the instant case Local 166 officials discussed Appellant's grievance among themselves and with GM personnel, but inexplicably neglected to take Appellant's grievance to the third stage of processing by not filing a Statement of Unadjusted Grievance with the appropriate GM official. Having sought and been granted two extensions of time to file the Statement and at no time

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[1] *De Arroyo* is parallel to the instant case. There, seven employees were discharged allegedly because of automation but in violation of seniority provisions. Their union failed to press their grievance out of an honestly mistaken belief that certain NLRB relief extended to them. The First Circuit found that good-faith mistaken belief was an unacceptable excuse for not pursuing the grievances and amounted to arbitrary and perfunctory processing, which *Vaca* explicitly stated was one ground for a finding of unfair representation.

having decided that Appellant's claim was without merit, the Local allowed the final deadline to pass without filing the Statement or requesting a further extension. At this point the Local did not inform either Appellant or GM that it had decided either to continue or to stop processing Appellant's grievance. Such negligent handling of the grievance, unrelated as it was to the merits of Appellant's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance.

The Unions argue that *Dill* v. *Greyhound Corp.*, 435 F.2d 231, 238 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971), stands for the proposition that bad faith is an essential element of any claim of unfair representation. *Dill* held that bad faith was required to support a claim of unfair representation where the union in question had made a decision that the (7) individual's grievance was without merit. In *Dill* we held that the interpretation by the company and union of the collective bargaining agreement was reasonable, so that refusing to invoke arbitration of Dill's grievance was a legitimate and proper way for the union to reject his view of the union's contract with the company. We do not deviate from our holding in *Dill* to conclude that when a union makes no decision as to the merit of an individual's grievance but merely allowsit to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation. As the *Vaca* Court stated,

> [A] union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion.
>
> . . .
>
> In administering the grievance and arbitration machinery as a statutory agent of the employees, a union must, in good faith and in a nonarbitrary

> manner, make decisions as to the merits of particular grievances.[2]

The Union made no decision as to the merits of Appellant's grievance, but merely allowed it to expire out of negligent and perfunctory handling. Thus, we must reverse the District Court's conclusion that Local 166 did not unfairly represent Appellant.

Local 166 argues through its cross-appeal that it should have been dismissed from the case for four alternative reasons.

First, it contends that Appellant should be collaterally estopped from pursuing his action because an intra-Union forum had decided his case adversely to him.

A Trial Committee of Local 166, to which Appellant took his *case against Panter under Article 31 of the UAW Constitution*, decided that Panter was not guilty of "consciously and purposely intending to allow a grievance to expire." The (8) International Union's Appeals Committee agreed with this conclusion, stating,

> [T]here is no evidence of any kind to indicate beyond a reasonable doubt that [Panter's] failure to secure management's Statements was motivated by personal and political differences over the years between him and [Appellant].

The UAW's Public Review Board, which sustained the International Executive Board's affirmance of its Appeals Committee, noted that the only issue before Local 166's Trial Committee

> was whether Mr. Panter intentionally let the grievance fail and in so doing was motivated by

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[2] 386 U.S. at 191, 194.

political considerations; the issue of his negligence or lack thereof was irrelevant.

The District Court held in a pre-trial order that the Trial Committee's decision did not collaterally estop Appellant from arguing in federal court that Panter had acted out of personal hostility in not filing a Statement of Unadjusted Grievance, in view of the "beyond a reasonable doubt" standard which prevailed before the forum. We agree with the District Court.

Furthermore, in view of our holding it is clear that the issue of Panter's negligence was not resolved adversely to Appellant by the Trial Committee, but that its decision supports the District Court's conclusion that Panter "neglected" to file the required Statement. Local 166's argument in this respect must, therefore, fail.[3]

Second, Local 166 argues that Appellant failed to exhaust his intra-Union remedies and under *Bsharah* v. *Eltra Corp.*, 394 F.2d 502 (6th Cir. 1968), should be barred from taking his (9) case to court. Specifically, the Local contends that Appellant should have appealed the adverse decision of the Local's rejection of his intra-Union claim that it had wrongfully processed his grievance.

For a period of 27 months, from March 1970 through June 1972, Appellant sought intra-Union relief against Local 166. We agree with the District Court that this was sufficient exhaustion of intra-Union remedies to permit it to hear his case. In *Bsharah* we affirmed the grant of summary judgment against an employee who had "failed

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[3] We need not address the problem of when collateral estoppel applies to intra-Union decisions when the adversely affected member alleges in court that the Union acted in breach of its duty of fair representation.

to allege or show any attempt to initiate her intra-Union remedies prescribed by the constitution and by-laws of the International Union." 394 F.2d at 503. The reason for this requirement is that intra-Union remedies are part and parcel of the industrial in-house procedure for settling labor disputes. The primary benefit of requiring initial submission of employee complaints against a union that refuses to help process a grievance against a company is that internal machinery can settle difficulties short of court action. Thus, federal policy requires "staying the hand of 'judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own internal affairs.' " *Imel* v. *Zohn Mfg. Co.*, 481 F.2d 181, 183 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), *quoting Brady* v. *Trans-World Airlines*, 401 F.2d 87, 104 (3rd Cir. 1968), *cert. denied*, U.S. 1048 (1969).

Appellant's diligent processing of his complaint through 27 months of intra-Union proceedings is far more than "at least some opportunity" for Local 166 to resolve its dispute with him. The requirement of exhaustion of intra-Union remedies is bottomed on the hope that such procedures will quickly resolve disputes without the delay inherent in the judicial process and with the aid of persons experienced at resolving member-union conflicts short of a full-blown judicial proceeding. When that hope has failed, however, the member is not barred from proceeding to federal court with a claim of unfair representation. To conclude otherwise would allow a union to prevent any (10) claim against it from reaching the stage of litigation by forcing aggrieved members through endless stages of review.

Third, Local 166 maintains that Panter's inaction in failing to file the required Statement was beyond his authority under Union rules, so that it is not liable for his negligence.

Panter was Chairman of the Shop Committe of Local 166, and it was his responsibility to file Statements of Unadjusted Grievance with GM officials. His action or inaction in that job was clearly attributable to his principal, Local 166. *Barefoot* v. *Teamsters Union*, 424 F.2d 1001, 1004-05 (10th Cir), *cert. denied*, 400 U.S. 950 (1970).

Finally, Local 166 argues that because no damages could be established even if an unfair representation claim were proven, dismissal is proper. It argues that "GM, if any party, would be solely liable to plaintiff."

Appellant's complaint asserts that GM and the Unions are jointly and severally liable for his injury. This is not true. When a union breaches it duty of fair representation, the employer remains liable for any damages "attributable solely to the employer's breach of contract," *i.e.*, the wrongful discharge. *Vaca*, 386 U.S. at 197.

When a breach of the duty of fair representation is shown, however, the Union is liable for that portion of Appellant's injury representing "increases if any in those damages [chargeable to the employer] caused by the union's refusal to process the grievance." *Vaca*, 386 U.S. at 197-98. Thus, upon a finding of unfair representation, "the court must fashion an appropriate remedy." 386 U.S. at 187, compensating Appellant from the Union's pocket for those expenses he incurred because of the Union's failure to process his grievance properly.

Since none of the grounds urged in Local 166's cross-appeal requires dismissal of Appellant's complaint against it, we reverse the District Court's judgment in its favor and remand for a finding of appropriate relief.

Our holding that the Local breached its duty of fair representation requires reversal of the District Court's dismissal of (11) Appellant's claim against GM. When the

Union has failed in its duty to fairly represent an employee, the employer may not invoke the Union's failure to follow procedures set forth in the collective bargaining agreement as a defense to the action of the employee. *Vaca* v. *Sipes*, 386 U.S. at 185.

G.M. has filed a cross-appeal which asserts that dismissal of Appellant's claim against it should nonetheless be affirmed on two alternative grounds. First, it argues that the complaint raises no factual issues and that it is entitled to summary judgment on the merits. Second, GM contends that dimissal should have been granted because of Appellant's failure to exhaust his intra-Union remedies. The District Court rejected both arguments in pre-trial orders.

The second ground is quickly rejected. As we stated above, Appellant sufficiently exhausted his intra-Union remedies to give the District Court jurisdiction *See also Scott* v. *Anchor Motor Freight, Inc.*, 496 F.2d at 279.

The first ground is that Appellant raised no genuine factual issue concerning his claim that discharge was so excessive a penalty for his offense as to amount to a breach of the collective bargaining agreement between GM and UAW. There appears to be no dispute that Appellant was intoxicated on the day in question and that he was abusive towards his foreman. Appellant's claim is that discharge was unwarranted in view of past treatment of similar offenses, which allegedly consisted of temporary suspension rather than discharge. His claim as stated in the original complaint was that discharge was "unduly harsh, arbitrary, discriminatory and contrary to past interpretations" of the UAW-GM National Agreement. Appellant filed a motion to amend his complaint to clarify the basis of this allegation, but the record filed on appeal contains no copy of the proposed amended complaint and the District Court took no action on Appellant's motion to amend.

Before trial GM filed a motion for summary judgment, asserting that under Rule 56, F. R. Civ. P., it was entitled to judg- (12) ment as a matter of law. Its supporting brief argued that because discharge was *permitted* under the National Agreement as a penalty for the offense Appellant allegedly committed, Appellant could not establish that discharge amounted to a breach of contract. The District Court denied this motion, stating:

> [T]he question is whether imposition of the discharge sanction in Ruzicka's case constituted a breach of contract by General Motors and this must be decided on the particular facts of this case.[4]

We have reviewed GM's supporting documents which accompanied its motion for summary judgment. The two affidavits and other materials support its claim that discharge is a permissible penalty which was employed once before (and upheld by an arbitrator) in a case somewhat similar to Appellant's. These materials do not, however, foreclose as a factual question whether discharge was a harsh, arbitrary, and discriminatory penalty in view of all the circumstances of Appellant's situation. Accordingly, we cannot find that Appellant's allegation concerning the discharge is beyond factual dispute, and we cannot overturn the District Court's refusal to grant summary judgment on the merits.

On remand, the District Court will be free to consider Appellant's motion to amend his complaint, and GM will be able to renew it motion for summary judgment. If a renewed motion is accomplished by materials which indicate that discharge is an ordinary penalty for someone in Appellant's position, considering the facts

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[4] Order, Civil No. 36598 (E.D.Mich., filed Apr. 25, 1973).

surrounding the discharge, Appellant's seniority, his past work record, and other matters relevant to the issue, Appellant will be required to demonstrate that there remains a factual issue by alleging specific facts to counteract GM's showing. Rule 56(e), F. R. Civ. P.; *R.E. Cruise Inc.* v. *Bruggeman*, 508 F.2d 415 (6th Cir. 1975). At this point, (13) however, we may not foreclose Appellant's opportunity to prove his case against GM.

Having reversed the District Court's dismissal of Appellant's claim against Local 166 and GM and having found no alternative basis entitling the Local 166 or GM to dismissal, we are left with a final question. This is raised by the Unions' cross-appeal, which seeks to overturn the District Court's denial of summary judgment concerning their cross-claim against GM and the eventual dismissal thereof.

The cross-claim sought to force GM to process the grievance further or to sent it directly to arbitration, despite the Unions' failure to follow procedures mandated by the National Agreement. On May 15, 1973, the District Court ordered the grievance submitted to an Umpire. Included in this Order was the requirement that the Umpire consider the issues of arbitrability and unfair representation, as well as the propriety of Appellant's discharge. Thus, the District Court originally granted the Unions' motion for summary judgment on their cross-claim, though on terms different from those requested by the Unions.

On August 31, 1973, the District Court impliedly revoked the May 15 Order by ordering that Appellant's charges of unfair representation be submitted to the Court for trial. Only if the Court found unfair representation would the grievance be submitted to a GM-UAW Umpire.

Based on the finding of no unfair representation, the District Court ordered dismissal of the entire action, including the Unions' cross-claim.

The Unions' cross-appeal purports to be an attack on the District Court's denial of all its pre-trial motions. The relief requested is that this Court

> reverse the District Judge's dismissal of the Unions' cross-claim against defendant General Motors and . . . order further processing of plaintiff's contract grievance pursuant to the GM-UAW Agreement or, in the alternative (14) only, modify the Judge's final order to provide that dismissal of said cross-claim was without prejudice.

In view of our reversal of the unfair representation conclusion, we need not decide whether the Unions' cross-claim was well taken had there been no unfair representation. Nor need we decide whether, in that event, further processing for the grievance should be ordered instead of merely providing that dimissal of the cross-claim was without prejudice.

Were we to decide that the District Cout should have granted the Unions' motion for summary judgment on their cross-claim, we would affect Appellant's ability to bring his case to a conclusion. The difficulty raised by the Unions' cross-appeal is that if further processing of the grievance within the GM-UAW structure is ordered, Appellant has been deprived of the opportunity to attain judicial resolution of his claim.

Thus, we are compelled to comment on the proper course of action for the District Court to take on remand. Its choice is basically between ordering the grievance submitted to arbitration or deciding itself the merits of Appellant's claim against GM.

This choice embodies two sets of interests. On the one hand, there is the strong interest in settling industrial disputes through arbitration. As discussed in the *Steelworkers Trilogy*, 363 U.S. 574 (1960), arbitration "is the substitute for industrial strife. . . . [A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960). An individual employee may prefer submitting his grievance to an arbitrator rather than a judge because the arbitrator is not bound to apply only those considerations expressed in the collective bargaining agreement. The parties to such an agreement

> expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, (15) insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[5]

Thus, the Supreme Court held in *Steelworkers* that

> [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is

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[5] *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. at 582.

> not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[6]

Furthermore, because of its more informal nature, the arbitration proceeding is "an efficient, inexpensive, and expeditious means for dispute resolution." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 58 (1974).

On the other hand, there is the interest in affording an aggrieved employee a final resolution of his claim. Appellant was discharged on March 31, 1970. Five years is far too long for an employee to await a final decision on his demand for reinstatement with back pay. Further relay (sic) would seeem unconscionable. Having met the heavy burden of showing that his Union unfairly represented him, Appellant is entitled to a judicial decision on his claim against the employer. *Vaca*, 486 (sic) U.S. at 186.

We believe that these interests can both be served if the District Court orders arbitration but retains jurisdiction of the (16) case until the claims against the Local and GM are settled. If the National Agreement is interpreted to mean that GM is relieved of its contractual duties because of the Union's failure to follow grievance procedures, the District Court should proceed to award appropriate relief[7] against local 166 on the unfair representation claim. To ensure a prompt conclusion to these proceedings, furthermore, the District Court should consider specifying a particular time within which arbitration should be completed. *See, e.g., Northwest Airlines, Inc.* v. *Machinists Workers*, 442 F.2d 244, 246 (8th Cir. 1970).

[6] *Id.* at 582-83.

[7] The questions of the proper allocation of damages between Local 166 and GM and of the measure of the Local's liability in the event that the grievance is found to be without merit are not before us.

Accordingly, we reverse the District Court's dismissal of the Unions' cross-claim and grant the relief specified.

The Judgment of the District Court is reversed, and the cause is remanded for proceedings consistent with this Opinion. The costs of the main appeal will be divided between GM, on the one hand, and Local 166, on the other, in equal amounts. The costs of the cross-appeal of the Unions will be borne by GM, along with the costs of GM's cross-appeal.

McCree, Circuit Judge (Concurring)

(17) I concur in the holding of the majority opinion that the local union breached the duty of fair representation that it owed appellant. However, I write separately because I do not believe that the local union's handling of the grievance was "arbitrary" or "perfunctory" as the majority opinion determines. The district court determined that the union, through Panter, *neglected* to file a timely statement of unadjusted grievance, and the majority opinion does not overturn this finding. Instead, it characterizes the negligent handling of the grievance as arbitrary and perfunctory.

Arbitrary and *perfunctory* are adjectives characterizing *intentional* conduct that is capricious or superficial. Here there was an *unintentional* failure to act that prevented appellant's grievance from being submitted to arbitration.

Nevertheless, I would hold that when a statutorily established exclusive bargaining representative fails to file a statement that is a prerequisite for submission of an employee's claim to arbitration, not because the union has made a good faith judgment for a lawful reason that it should not file the document, but merely because of its negligent omission, then it has breached its duty of fair representation.

I do not suggest, however, that a union should be held liable for all negligence in processing an employee's grievance. Such a rule would put the courts in the position of second-guessing union representatives' decisions. In accordance with the "general congressional policy favoring expert, centralized administration, and remedial action" of employee grievances, *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1970), I believe courts should not try to determine whether, in fulfilling its duty of fair representation, a union has adopted the tactic best suited to the needs of an aggrieved employee.

Nevertheless, I believe that a total failure to act, whether negligent or intentional, except for a proper reason, is behavior so egregious that, as in the case of bad faith, hostile discrimination, arbitrariness, or perfunctoriness, the union should be held (18) responsible. We have stated that an action will lie against a union for " . . . such gross mistake or inaction as to imply bad faith." *Balowski* v. *International Union*, 372 F.2d 829, 834 (1967). It requires only a slight extension of this principle to require the local to answer to a member if it precludes any consideration of the employee's grievance by its sheer neglect to timely file a paper that the employee is prevented by law from filing for himself.

I believe that the incidence of an injury of this magnitude should be shifted from the innocent employee to the union whose flagrant negligence was responsible for it.

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals
for the Sixth Circuit)
(Filed December 9, 1975)

Before: Weick, Celebrezze and McCree, Circuit Judges.

The International Union of the UAW, Local 166 of the UAW, and General Motors Corporation (GM), Defendants below and Appellees and Cross-Appellants in this Court, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, petition for rehearing and suggestion of Rehearing en Banc.

Upon consideration of the petition for rehearing with the suggestion that it be heard en banc, it appearing that a majority of the active Judges of this Court did not vote in favor of an en banc hearing, the petition for rehearing has been referred to the panel which heard the original appeal.

The International Union, UAW and Local Union 166 UAW, and General Motors make a number of arguments in support of their petitions for rehearing. Having considered all issues raised we believe two require comment.

General Motors argues that the Court's opinion can be read to imply that an employee can invoke § 301 of the Labor-Management Relations Act to protect rights other than those afforded him by the collective bargaining agreement covering his unit. General Motors points to no specific language in the opinion as conveying this impression and we can find none. Ruzicka was only attempting to enforce the commitments contained in the Collective Bargaining Agreement.

The Unions contend that the Court's opinion contains language which conflicts with language in *Balowski* v.

UAW, 372 F.2d 829 (6th Cir. 1967), and *Dill* v. *Greyhound Corp.*, 435 F.2d 231 (6th Cir. 1970), and consequently with cases which rely on *Balowski* and *Dill*. In *Balowski* the Union took a variety of steps on the employee's behalf and all of these steps were taken in a timely manner. It was not until an independent physician found the employee unable to perform the duties of the job to which he was seeking reinstatement that the Union withdrew the employee's grievance. In *Dill*, although the union local failed to take action on Dill's grievance it did resolve the grievance of two other similarly situated employees which raised the identical question contained in Dill's grievance.

We distinguished *Dill* by stating:

> "We do not deviate from our holding in *Dill* to conclude that when a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation." Slip opinion page 7.

Thus, we distinguish the *Balowski* - *Dill* line of cases in which the unions considered the issues raised in the employees' grievances and decided the grievances did not merit pursuing.

Our opinion in this action speaks to a narrow range of cases in which unexplained union inaction, amounting to arbitrary treatment, has barred an employee from access to an established union-management apparatus for resolving grievances.

Judge McCree concurs for the reasons set forth in his separate concurring opinion.

It is Ordered that the Petition for Rehearing be denied.

Entered By Order Of The Court
/s/ John P. Hehman, Clerk

Concurring Opinion (Dissenting)

Re: *William Ruzicka* v. *General Motors*, Nos. 74-1939-41.

Edwards, Circuit Judge, dissenting. Since I feel that both motions for rehearing en banc filed in these cases raise questions of exceptional importance, and that full court consideration is necessary to maintain uniformity of our opinions, I dissent.

Judges Lively and Engel concur in this dissent.

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Oct. 10, 1977)

(William Ruzicka, Plaintiff, v. General Motors Corporation, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local Union 166, Defendants — No. 36598)

William Ruzicka's suit against General Motors Corporation for wrongful discharge and against Local 166 of the International Union, United Automobile Workers for breach of duty of fair representation is before this Court a second time following remand from the United States Court of Appeals for the Sixth Circuit. The action was originally dismissed on November 21, 1973, after presentation of plaintiff's proofs at trial and a motion to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure made by all defendants. On appeal, the case was reversed and remanded for further proceedings, including the taking of additional evidence and the arbitration of Ruzicka's wrongful discharge claim against

General Motors. Those proceedings have now been completed, and following post-trial briefs and final arguments from all parties, the case has been submitted to the Court for further findings of fact and conclusions of law. In its present posture, the case presents important issues regarding a union's duties of fair representation and its potential liability for breach of those duties under 29 U.S.C. § 185. Before addressing these issues, a fuller statement of the background of the case and the proceedings had to date is required.

I.

William Ruzicka was employed by General Motors for almost eleven years, from April, 1959 until March 31, 1970, as a millright in the Company's Willow Run Assembly Plant. During that time, he was a member of UAW Local 166[1] and took an active role in Local Union affairs. On March 31, 1970, Ruzicka was observed by his supervisor sitting on a stool at the start of his shift, apparently drunk. He was immediately escorted to the Company's labor relations office for a disciplinary interview. He requested representation by a shop committeeman, and during the ensuing ten minute wait made a number of threats and abusive remarks to his supervisor.[2] Following the interview, Ruzicka was discharged for being intoxicated on the job and for using threatening and abusive language, in violation of Shop Rules 32, 29, and 20.

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[1] Due to a reorganization, the Local Union is now Local 1776.

[2] The statements allegedly included: "I'm going to beat you up," and "I'm going to wait for you in a bar or at the Wayne Bowling and I'm going to have guys there to beat you up and I'm going to get the last one in." Ruzicka also allegedly called his supervisor a "m____ f____ s.o.b.," a "pig" and a "snake."

That same day, Ruzicka filed a grievance protesting the Company's action and seeking reinstatement.[3] The grievance was processed by Local 166 on his behalf through the second step of the grievance procedure, established under ¶s 28 through 55 of the GM/UAW collective bargaining agreement, without resolution. Thereafter, on April 14, 1970, the Union filed a "notice of unadjusted grievance," under ¶ 37, to initiate the third step of the grievance procedure.[4] At that point, both the Company and the Union were required under ¶ 37 to simultaneously exchange "statements of unadjusted grievance." The exchange was to be made by Charles Panter, chairman of the shop committee, on behalf of Ruzicka and the Union, and by Ross Hagerman, plant supervisor of labor relations on behalf of the Company. After two mutually agreed upon extensions, an exchange date of May 5, 1970 was finally set.

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[3] Ruzicka's grievance read as follows:

> Grievance No. 035364
>
> "Union protests unjust penalty for allegedly violating Shop Rules #32, 29, 20. All set of circumstances were not taken into consideration. Union demands this employee be brought back to work with full back pay for all time lost & all benefits & record cleared."
>
> Signed: W.R. (Grievant)
> B.P. (Committeeman)

[4] Paragraph 37 of the GM/UAW collective bargaining agreement provides in pertinent part:

> Step Three, Appeal to Corporation and International Union
>
> (37) If the grievance is not adjusted at this step and the Shop Committee believes it has grounds for appeal from the Plant Management decision, the Chairman of the Shop Committee will give the Plant Management a written "Notice of Unadjusted Grievance," on forms supplied by the Corporation, and the Chairman or designated member of

(Continued on following page)

The exchange never took place. General Motors subsequently took the position that Panter had not tendered the Union's statement of unadjusted grievance by the May 5th deadline, and relying upon the finality provisions of the grievance procedure, ¶ 77 of the contract, refused to process the grievance further. William Moon, who succeeded Panter as shop committee chairman on May 17, 1970, belatedly offered to exchange the statements on May 26, 1970; this offer was rejected by the Company. On June 4, 1970, Moon filed a "policy grievance" over the Company's refusal to further process Ruzicka's grievance,[48] but this was subsequently withdrawn on April 26, 1971, in the context of new contract negotiations.

(Continued from preceding page)

> the Shop Committee will then prepare a complete "Statement of Unadjusted Grievance" setting forth all facts and circumstances surrounding the grievance signed by the Chairman of the Shop Committee. The Plant Manager or his designated representative will also prepare a complete "Statement of Unadjusted Grievance" and the Management's reason in support of the position taken, signed by the Plant Manager or his authorized representative. Three copies of the Union's statement will be exchanged with the Management for three copies of the Management's statement as soon as possible and in any event within five (5) working days of the date of filing the Notice of Unadjusted grievance. The exchange of statements shall take place fifteen (15) working days after receipt of the Plant Management's decision, unless this time is extended by mutual agreement in writing. . . .

[48] The policy grievance reads as follows:

> #018127
>
> Chairman of the shop comm. charges Management with viol. of past practice & par. 37 of the National Agreement & taking advantage of transition of office from 1 chairman to another. Union demands appealed grievances of William Ruzicka and A. Steele be put back in procedure at step three of the National Agreement.
>
> Date Presented: 6-4-70
> Reported by: Policy
> C/M B. Moon

After twenty-seven months of exhausting his intra-union remedies,[5] Ruzicka filed this action on June 3, 1971. Against General Motors, Ruzicka alleged that his discharge was unduly harsh and discriminatory and therefore in violation of the GM/UAW collective bargaining agreement. 29 U.S.C. § 185. Against the International UAW and its Local 166, Ruzicka alleged a breach of duty of fair representation in failing to properly process his grievance for reinstatement. 29 U.S.C. § 185. Following denial of defendant's pre-trial motions for dismissal and for summary judgment, the case was brought on for trial to the Court. By mutual agreement, the trial was limited initially to plaintiff's claim against the Local Union and its parent International for breach of duty of fair representation.

Plaintiff's proofs in support of this claim focused principally on the issue of whether Panter had failed to timely file the statement of unadjusted grievance. Hagerman and his subordinate, Jerry Bennet, both testified that exchanges of these statements were usually made in Hagerman's office and that Panter never appeared in Hagerman's office to exchange statements on Ruzicka's grievance. Bennet also testified that no Union statement on Ruzicka's grievance was subsequently found in the Company's personnel records. Panter, called as a witness by the Court, contradicted his

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[5] Ruzicka first filed charges against Panter under Article 31 of the UAW Constitution, charging that Panter had wilfully neglected his grievance out of personal hostility. A trial committee found Panter not guilty of this charge. Ruzicka also proceeded against his Local on a similar charge, but this was also denied. Subsequent appeals to the International Union's Appeals Committee, the International Executive Board, and the Public Review Board were also denied. Ruzicka also filed charges against both the Union and the Company with the National Labor Relations Board, but the Regional Director refused to issue a complaint, and this decision was upheld by the Board's General Counsel.

testimony, contending that he had filed the Union's statement during the first week of May, 1970, though he was unsure of the specific date. There was testimony by all witnesses that during Panter's tenure as shop committee chairman, exchange deadlines were laxly enforced and extensions were freely granted by both the Union and the Company, often when the deadline had aleady passed.

Ruzicka testified that on April 15, 1970, he had delivered to Panter, in the presence of several other union officials, a handwritten statement of unadjusted grievance he had prepared himself and was told by Panter at that time that his grievance would be appealed. Ruzicka further testified that at the time his grievance was being processed, he had fallen into disfavor with officials of Local 166, especially Panter, who was personally hostile toward him because of past conflicts in intra-union politics.

Following submission of this evidence, defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 41(b), on the ground that Ruzicka had failed as a matter of law to establish a breach of duty of fair representation. This motion was granted in a memorandum opinion dated November 21, 1973, in which the Court made findings of fact and conclusions of law, as provided by Rule 41(b). The Court found, on substantial credible evidence, that Panter had failed to file the Union's statement of unadjusted grievance by the twice extended May 5, 1970 deadline and that at the time Ruzicka's grievance was in process, some hostility did exist between Ruzicka and Panter. However, no showing was made and the Court was therefore unable to find that Panter's hostility had motivated his intentional mishandling of the grievance or had otherwise tainted his representation of Ruzicka. In short, the Court was unable to find bad faith.

In the absence of bad faith, the Court held that defendant Unions could not be liable for breach of duty of fair representation:

> The duty of fair representation is breached only when the union's conduct is "arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 190. There must be "substantial evidence of fraud, deceitful action or dishonest conduct," *Humphrey* v. *Moore*, 375 U.S. 335, 348 (1964), or of "discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 301 (1971). To insure that the salutary purposes of the pre-emption doctrine are not subverted by excluding unfair representation suits from its purview, the distinction "between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment on the other, needs strictly to be maintained." *Lockridge*, *supra*, 403 U.S. at 301. Memorandum Opinion, November 21, 1973, pp. 4-5.

Having dismissed plaintiff's claim for unfair representation against the Local and International Unions, plaintiff's claim for wrongful discharge against General Motors was dismissed as well. *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Balowski* v. *International Union*, 372 F.2d 829, 832-833 (6th Cir. 1967).

All parties appealed. Plaintiff appealed the dismissal of his action under Rule 41(b), contending that a *prima facie* case of Union bad faith in the processing of his grievance had been made out by his trial proofs. General Motors appealed the Court's denial of its pre-trial motion to

dismiss on grounds of failure to exhaust intra-union remedies. The Unions appealed the Court's denial of their pre-trial motion to dismiss on grounds of failure to exhaust intra-union remedies and collateral estoppel as to adverse decisions in those union remedies which Ruzicka had exhausted. The Unions also appealed the Court's denial of their cross-claim against General Motors to compel arbitration.

On September 23, 1975, the Court of Appeals issued its decision. *Ruzicka* v. *General Motors Corp., et al.*, 523 F.2d 306 (6th Cir. 1975). The Court affirmed the dismissal of plaintiff's action against the International UAW, finding that plaintiff had not proved the involvement of any officials of the International in the processing of his grievance. *Hines* v. *Local 377*, 506 F.2d 1153, 1157 (6th Cir. 1974). rev'd on other grounds, 424 U.S. 554 (1975). The denial of defendant's pre-trial motions to dismiss was also affirmed, the Court concluding that plaintiff had pleaded a valid cause of action against General Motors, had sufficiently exhausted his intra-union appeals, and was not collaterally estopped by prior adverse decisions in those appeals.

As to the Rule 41(b) dismissal of plaintiff's claim against Local 166, however, the Court of Appeals reversed. Accepting the facts as found by this Court in its memorandum opinion of November 21, 1973, the Court nevertheless held that Panter's "negligent and perfunctory handling" of plaintiff's grievance constituted a breach of duty of fair representation, even in the absence of bad faith:

> We believe that the District Court misread *Vaca* when it held that "bad faith" must be read into the separate and independent standards of "arbitrary" or "discriminatory" treatment. Union

action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation.

In the instant case Local 166 officials discussed Appellant's grievance among themselves and with GM personnel, but inexplicably neglected to take Appellant's grievance to the third stage of processing by not filing a Statement of Unadjusted Grievance with the appropriate GM official. Having sought and been granted two extensions of time to file the Statement and at no time having decided that Appellant's claim was without merit, the Local allowed the final deadline to pass without filing the Statement or requesting a further extension. At this point the Local did not inform either Appellant or GM that it had decided either to continue or to stop processing Appellant's grievance. Such negligent handling of the grievance, unrelated as it was to merits of Appellant's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance. *Ruzicka* v. *General Motors Corp., et al. supra* at 310.

The Court of Appeals also reversed the dismissal of plaintiff's complaint against General Motors, holding that substantial factual issues remained as to his claim of wrongful discharge and that General Motors would not be entitled to rely on the finality provisions of the grievance procedure as a defense to this claim if the Union had breached its duty of fair representation.

Having determined that Ruzicka's claims against both General Motors and Local 166 would have to be remanded for further proceedings, the Court of Appeals went on to consider the Union's cross-claim for arbitration. After a discussion of the advantages and

disadvantages of this procedure, the Court directed that plaintiff's grievance for wrongful discharge against General Motors be referred to arbitration, with this Court retaining jurisdiction of the case until all claims against defendants were resolved.[5a]

Following remand, on August 20, 1976, Ruzicka's grievance was referred to a GM/UAW Umpire for arbitration on its merits.[6] At the October 14, 1976 hearing before the Umpire, General Motors offered no testimony, resting its case for plaintiff's discharge on the records of the Company and the facts as brought out in the earlier grievance proceedings. The Union offered no evidence in rebuttal, arguing that the Company had failed to sustain its burden of justifying plaintiff's discharge. After receiving certain documentary exhibits into the record, the Umpire took the matter under advisement, and on November 11, 1976, issued his decision finding General Motors liable for wrongful discharge and breach of GM/UAW collective bargaining agreement.

[5a] A petition for rehearing with suggestion of rehearing en banc was denied by the Court of Appeals on December 9, 1975. Judges Edwards, Lively, and Engel dissented. *Ruzicka* v. *General Motors Corp., et al.*, 528 F.2d 912 (6th Cir. 1975).

[6] The order of arbitration provided:

> It Is Ordered that plaintiff William Ruzicka's grievance is referred to arbitration to be determined in accordance with the collective bargaining agreement to which defendants are parties;
>
> The issue to be resolved by arbitration is whether plaintiff William Ruzicka's discharge is justified and if so, to provide appropriate relief;
>
> It Is Further Ordered that this arbitration proceeding shall be commenced and concluded within three (3) months of the date of this order;
>
> The court retains jurisdiction of this cause for the purpose of determining appropriate relief, in any event, against Local 166 because of its breach of the duty to represent William Ruzicka.

In a thorough and well-written opinion, the Umpire determined that Ruzicka's intoxication on March 31, 1970, justified only a 30-day suspension without pay, in view of his past disciplinary and work records, and in light of prior decisions of other umpires imposing at most a 30-day suspension in similar cases. The Umpire futher found that General Motors had acted improperly in requiring Ruzicka to submit to an immediate disciplinary interview in his still-intoxicated condition, and should have sent him home and postponed the interview until the following day. Under these circumstances, the Umpire ruled that Ruzicka could not be held accountable for his abusive and insubordinate conduct toward his superiors.

The Umpire did not pass upon General Motors' procedural defense to Ruzicka's grievance based upon the Union's failure to timely file its statement of unadjusted grievance. Rather, the Umpire, pursuant to the terms of this Court's order of arbitration, dealt only with the merits of the grievance,[7] and accordingly, found General Motors in breach of the GM/UAW contract and liable for reinstatement with full back pay.

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[7] In a cover letter to the order sent to attorneys for all parties, the Court stated:

> By my order referring this grievance to arbitration, there will be one issue before the arbitrator. If the arbitrator decides that the penalty employed was too severe, the remedies under the contract against General Motors Corporation will be made available to Mr. Ruzicka. If the arbitrator decides that the penalty was justified, Mr. Ruzicka will have no remedies against General Motors Corporation. In either case, since this Court will retain jurisdiction, Mr. Ruzicka may return here for appropriate relief against Local 166 because of its breach of representation of plaintiff. That decision will await the outcome of arbitration.

Following arbitration, plaintiff moved for summary judgment against General Motors upon confirmation of the Umpire's decision and for summary judgment against Local 166 based on the Court of Appeals decision. General Motors opposed summary judgment and argued that this Court had misread the Court of Appeals directions on remand in submitting only the merits of Ruzicka's wrongful discharge claim to arbitration. Both the Company and the Union argued that the Court of Appeals decision did not preclude the submission of further evidence regarding the issue of the Union's breach of duty of fair representation.

At hearings held on February 10 and 28, 1977, the Court ruled that summary judgment against General Motors based upon the Umpire's award could not be entered unless the liability of the Union for breach of duty of fair representation was first found. *Vaca* v. *Sipes*, *supra*; *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 569-570 (1975). The Court indicated, however, that in all other respects the Umpire's decision appeared just and reasonable and would be confirmed by the Court if the liability of the Union were established.[8]

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[8] The Court reaffirmed its decision referring only the merits of Ruzicka's grievance to arbitration. General Motors' procedural defense to plaintiff's claim of wrongful discharge would be no defense at all if plaintiff's claim of breach of duty of fair representation against the Union is sustained. As recognized by the Umpire in his decision of November 11, 1976, plaintiff's claim against the Union is beyond the scope of his decisional authority, which is limited under ¶s 46 and 53 of the GM/UAW contract solely to deciding claims for breach of the contract. Accordingly, General Motors' procedural defense, because it is necessarily dependent upon the outcome of plaintiff's claim against the Union, can only be determined by the Court.

The Court ruled that summary judgment on the Union's liability could not be entered merely on the basis of plaintiff's initial proofs at trial and the intervening decision of the Court of Appeals. While the Court of Appeals decision does contain statements which appear to hold unequivocally that Local 166 is liable for breach of duty of fair representation, these statements must be read in light of the incomplete record which was before the Court following dismissal of plaintiff's action under Rule 41(b). Defendants had not presented any evidence in defense of plaintiff's claims at that point and had not foregone their right to do so by moving for a Rule 41(b) dismissal. *Riegel Fiber Corp.* v. *Anderson Gin Co.*, 512 F.2d 784 (5th Cir. 1975); *White* v. *Rimrock Tidelands, Inc.* 414 F.2d 1336 (5th Cir. 1969). Thus, the decision of the Court of Appeals must be construed to establish only a *prima facie* duty of fair representation. According to Moore's Federal Practice, a reversal of an order of dismissal under Rule 41(b) would preclude the presentation of further evidence by defendants in only a limited number of cases:

> Where the facts are not disputed or where defendant has presented all his evidence upon being called as a witness for the plaintiff the appellate court upon reversal of a dismissal may properly direct the district court to enter judgment for the plaintiff. 5 Moore's Federal Practice ¶ 41.13[2] (footnote omitted).

No such directive was issued by the Sixth Circuit Court of Appeals in this case.

Having denied plaintiff's motions for summary judgment, the Court proceeded to hear further testimony from the Local Union in defense of plaintiff's unfair representation clam, Following this, all parties presented testimony and documentary evidence on the issue of damages. Extensive post-hearing briefs have been filed.

II.

The first issue to be determined is the liability of Local 166 on plaintiff's claim for breach of duty of fair representation. As noted above, the Union presented further testimony in defense of this claim following remand. This recent testimony primarily focused, as did plaintiff's evidence at the original trial, on the issue of whether Panter had timely filed the Union's statement of unadjusted grievance. The Union presented testimony from four Local officials, Dennis King, Ralph Stevens, Ray Westphal, and Bernard Pritchett, who all testified, with only minor variation, to a meeting they had witnessed between Panter and Jerry Bennet in the Company's labor relation office on April 30, 1970, at which Panter had presented to Bennet the Ruzicka statement of unadjusted grievance. According to this testimony, Bennet accepted the statement and placed it in the Company's files. Westphal and Pritchett further testified to a meeting with Hagerman in Hagerman's office, several days later, when Hagerman showed them the Ruzicka statement in his files.

This testimony directly conflicts with previous statements made by other witnesses in the case, particularly Hagerman and Bennet, who both denied ever receiving the Union's statement. Where such a conflict in testimony is presented, the Court, as the finder of fact, must judge the credibility of the witnesses and consider other relevant circumstances to determine which version of the facts to credit. Federal Rule of Civil Procedure 52(a); *Sweeney* v. *American Steamship Co.*, 491 F.2d 1085, 1089-1090 (6th Cir. 1974). In this case, despite the recent testimony of these Union officials in defense of their Local, the Court remains persuaded that Panter's filing of the Ruzicka statement of unadjusted grievance never took place.

Two of these Union officials who testified to an April 30, 1970 filing of the Unions statement testified otherwise on prior occasions. King testified before a Union trial committee on July 6, 1971 that Panter had actually presented the statement to Bennet on May 5, 1970. Prichett testified before the trial committee in 1971 that he did not remember any filing of the Union statement with Bennet. Moreover, Dolores Weems, the secretary for Local 166, testified both before the trial committee and at recent proceedings before the Court that it was not until May 5, 1970 that she had typed the final draft of the Union's statement, and original and eight copies, and presented them to Panter for filing. The discrepancy in dates here is important. Bennett, called as a witness in rebuttal, testified that he was on vacation on May 5, 1970. He further testified that on May 26, 1970, when Moon approached him and belatedly attempted to make the exchange, he still had all of the Union copies of the Ruzicka statement in his possession. The testimony of these Local officials is also belied by their actions and attitudes toward Ruzicka's grievance following this alleged April 30th meeting. In particular, no one appeared to challenge General Motors' assertion at the time that the Union statement in Ruzicka's case had not been filed. No one accused the Company of being the guilty party in neglecting to file its statement with Panter. Moon has testified that upon taking over from Panter as shop committee chairman on May 17, 1970, he reviewed the status of all union grievances and determined that no exchange of statements had been made in Ruzicka's case. It was on this basis that Moon subsequently attempted an exchange of statements on May 26, 1970. The policy grievance later filed on Ruzicka's behalf alleged only that the Company had taken unfair advantages of a turnover in Local Union administration and past practices regarding exhange deadlines in Ruzicka's case. The policy grievance was subsequently withdrawn.

These circumstances lend credibility to the testimony of Hagerman and Bennet, who both contended that no Union statement was ever filed by Panter. Panter himself testified at the original trial that he had filed the Ruzicka statement of unadjusted grievance prior to the May 5, 1970 deadline. The Court's initial findings of fact rejected this direct testmony (sic) of a timely filing by Panter, and the Court sees no reason now to view the more recent and merely corroborative testimony of these Local Union officials as any more convincing. The Court therefore reaffirms its initial findings of fact as stated in its memorandum opinion of November 21, 1973, concluding that Panter neglected to file the Ruzicka statement of unadjusted grievance prior to the May 5, 1970 deadline.

Having affirmed this fact, it would appear that the Union must be held liable for breach of duty of fair representation, as that duty has already been defined in this case by the Court of Appeals. During final arguments and in its post-hearing brief, however, the Union argued otherwise, contending that it was still open to this Court to find no breach of duty of fair representation even in the absence of a timely exchange of statements by Panter. This argument is based on the testimony of several witnesses showing a practice of freely granting extensions of exchange deadlines, which was observed as a usual shop procedure by both the Union and the Company at the time Ruzicka's grievance was processed. According to the Union, if Panter did not timely file the Ruzicka statement, he failed to do so in reliance on this prevailing shop practice. Thus, while Panter may have been negligent in his conduct, he was not so negligent as to have acted in an "arbitrary or perfunctory" manner, as the Court of Appeals used those terms in defining a breach of duty of fair representation.

This argument is not wholly unpersuasive to the Court, and were it free to decide this issue as one of first impression, the Court might very well agree with the Union that Panter's conduct under these circumstances was not so grossly negligent as to constitute unfair representation. But this argument, in the Court's view, has been foreclosed to the Union by the Court of Appeals decision. Evidence of the shop practice referred to by the Union was presented at the original trial in 1973 through testimony by both Moon and Hagerman. The Court, in its memorandum opinion of November 21, 1973, discussed this evidence and found that extensions of exchange deadlines were freely given by both the Union and the Company during Panter's tenure as committee chairman. This evidence was a part of the record reviewed by the Court of Appeals and was therefore necessarily considered by that Court in its decision. Despite this evidence, and without disturbing this Court's findings of fact, the Court of Appeals nevertheless determined that Panter's conduct constituted unfair representation.

In its defense following remand, the Union has presented only testimony corroborative of prior testimony establishing a practice of free extensions in exchange deadlines. No new testimony or evidence has been presented to show that Panter was, for some other and additional reason, less culpable in his failure to file the Ruzicka statement than the Court of Appeals has already determined on the basis of the partial record previously before it. For these reasons, the Court must conclude that the Union's defense of Panter's conduct, based on extenuating shop practices, has already been implicitly presented to the Court of Appeals and rejected by that Court in its decision of September 23, 1975. This Court is bound by that decision.

The Union has also raised three alternative defenses against plaintiff's claim of unfair representation, all based on the conduct of certain other Union officials and Company employees which, in the Union's view, excused Panter's failure to make a timely filing of the Ruzicka statement. As a first, alternative defense, the Union relies on testimony from several witnesses indicating that in the middle of April, 1970, Bernard Pritchett appeared in Hagerman's office and showed him a handwritten statement of unadjusted grievance in Ruzicka's case — apparently a rough or preliminary draft of the statement. Prichett read the statement aloud to Hagerman and left. This action, the Union argues, was "substantial compliance" with the exchange requirements of the grievance procedure. As a second alternative defense, the Union contends that Moon's belated attempt to exchange the Ruzicka statement on May 26, 1970 should also be viewed as substantial compliance with the grievance procedure, and that General Motors should have accepted the Union statement at that point and raised whatever procedural objection it had with the Union's late filing at arbitration. Thirdly, the Union argues that Panter's failure to tender a statement of unadjusted grievance should be excused because the Company never tendered its statement of unadjusted grievance. As the Union points out, the grievance procedure requires an exchange to statements; the obligation is a mutual one, and because neither side ever filed its statement with the other, the requirement of timely exchange should be deemed mutually abandoned, citing *NCR Employees Ind. Union* v. *National Cash Register Co.*, 489 F.2d 716, 717 (6th Cir. 1973); *Boone* v. *Armstrong Cork Co.*, 384 F.2d 285 (5th Cir. 1967).

None of these arguments are persuasive. Prichett's oral reading of a rough draft of the Union statement to

Hagerman in late April, 1970 was not substantial compliance with the filing requirements of the grievance procedure, because it was not an attempt to comply with those requirements and because it was certainly not substantial. There is no evidence that Pritchett's action was taken in any formal capacity as part of the Union's official representation of Ruzicka's grievance. Apparently neither Pritchett or Hagerman believed that this oral preview of the Union statement was an attempt to comply with the exchange requirements of the grievance procedure, and, indeed, any such belief would have been difficult to reconcile with the explicit provisions of ¶ 37 of the GM/UAW contract, which require the filing of a written statement, three copies, "signed by the Chairman of the Shop Committee." Pritchett's oral presentation of the Ruzicka statement did not excuse Panter's neglect in failing to file the formal written version.

Nor was Panter's neglect excused by Moon's belated attempt to make the exchange in late May, after the exchange deadline had run. The last and final mutually agreed upon date for making the exchange in Ruzicka's case was May 5, 1970. Exchange deadlines are specifically provided in the GM/UAW contract, and under ¶ 37, deadline extensions must be in writing and mutually agreed upon. Moon did not tender the Union statement by the deadline and did not obtain any agreement, written or otherwise, on a deadline extension. To argue that the Company should have made the belated exchange with Moon and reserved its procedural objection for arbitration is really no argument at all. In light of the exchange deadline and finality provisions established by the grievance procedure, the Company's procedural objection would undoubtedly have been successful, and Ruzicka's grievance would still have been dead as a result of Panter's neglect.

The failure of General Motors to tender its statement of unadjusted grievance to the Union by the May 5, 1970 deadline is simply irrelevant here. There has been no showing that Panter's failure to file the Union statement was in any way related to or dependent upon the absence of a Company statement. Panter's failure was caused purely by his own neglect. Nor is there any indication of a mutual abandonment of the exchange deadline requirements by the Company and the Union through any mutual failure of exchange or through any mutual misunderstanding regarding the applicability of the exchange requirements. Contrast *NCR Employees Ind. Union* v. *National Cash Register Co., supra,* and *Boone* v. *Armstrong Cork Co., supra,* cited by the Union. So far as the record indicates, the Company had drafted its statement of unadjusted grievance by the May 5th deadline and was prepared to make a timely exchange.[9] The Union has never presented any evidence to indicate otherwise. Far from abandoning the exchange deadline requirements, the Company explicitly asserted them in support of its refusal to process Ruzicka's grievance further. The Court cannot on this record allow the Union to shift its responsibility for failing to make the exchange of statements to the Company. Panter, as the Union's representative, had a duty under the grievance procedure to present the Union's statement by May 5, 1970. He breached that duty for reasons wholly unrelated to any possible neglect or misfeasance on the Company's part, and it is Panter, after all, not the Company, that is being charged here with breach of duty of fair representation.

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[9] Hagerman testified to these facts at the original trial in 1973; a copy of the Company's statement of unadjusted grievance was admitted into evidence at that time.

The Union has also presented several arguments in defense of plaintiff's claim of unfair representation based on a series of subsequent attempts by the International and Local 166 to persuade or compel the Company to suspend the exchange deadline in Ruzicka's case and arbitrate the merits of his grievance. In particular, the Union points to the policy grievance filed by Moon in June of 1970. This policy grievance, it is argued, was a reasonable means of protesting the Company's refusal to further process Ruzicka's grievance and a reasonable attempt to compel arbitration on the merits of his claim for reinstatement. Thus, the policy grievance, it is argued, "mooted any alleged inaction in connection with the initial grievance." Furthermore, in conjunction with the policy grievance, various officials of Local 166 and the International negotiated with the Company throughout 1970 and 1971 in an attempt to re-activate Ruzicka's grievance. Once this suit was commenced, counsel for Local 166 asked General Motors to submit Ruzicka's grievance to arbitration; a cross-claim seeking such relief was filed by the International Union and eventually granted in limited form by the Court of Appeals. This series of subsequent efforts to persuade or compel General Motors to further process the grievance demonstrates, in the Union's view, that under the totality of the circumstances, no breach of duty of fair representation was committed.

The Court disagrees. None of these subsequent actions, either singly or collectively, excused the initial failure of Panter to properly process Ruzicka's grievance from the second to the third step of the grievance procedure, because none of them were successful. The policy grievance filed by Moon was undoubtedly, at that point, an appropriate means of attempting to get Ruzicka's grievance re-activated. But it did not in fact result in the re-activation of Ruzicka's grievance, and it

plainly was not the Ruzicka grievance itself. The policy grievance, which tacitly admitted Panter's initial failure to timely file the statement of unadjusted grievance, was rejected by the Company and eventually dropped by the Union. It did not "moot" anything.

The other subsequent efforts by both the Local and the International to force an arbitration of Ruzicka's grievance were equally unavailing. Even the Union's cross-claim against General Motors to compel arbitration succeeded only in obtaining a hearing before the Umpire as a part of the proceedings in this suit. As previously discussed, a judgment on the Umpire's award is necessarily dependent upon the success of plaintiff's claim against the Local Union. Thus, ironically, if the Court were to accept the Union's argument that its efforts in obtaining an Umpire's award preclude a finding of unfair representation, plaintiff would never get the award. Clearly, the injury done to Ruzicka through Panter's neglect has not been cured by any of these subsequent and, in some cases, self-serving attempts by the Local to reinstate his grievance. These acts are therefore no defense to plaintiff's claim of unfair representation.

The Union makes one final argument in defense of plaintiff's claim which may be quickly disposed of. It is the Union's contention that during an *in camera* conference in this case held on March 15, 1976, counsel for General Motors offered at one point to submit Ruzicka's claim for reinstatement to arbitration solely on its merits. This offer, in the Union's view, constituted a "waiver" by General Motors of any defense to plaintiff's grievance and his claim of wrongful discharge based on the procedural requirements of the grievance procedure.

This defense is supported by the affidavit of the Union's counsel, Jordan Rossen, and the Court need look

no further than this affidavit in rejecting it. The alleged offer to arbitrate on the merits was made by General Motors in the context of a pre-trial conference in this lawsuit, and more important, in the context of a discussion by all parties and the Court as to the proper scope of the arbitration hearing which had been ordered by the Court of Appeals. As the affidavit itself notes, there was some question at the time as to whether the Court's arbitration order meant to include the Company's procedural defense. In this light, the "waiver" by General Motors was more probably simply an opinion by the Company's counsel on this issue. Even if the alleged representation is construed as a genuine offer to arbitrate the grievance on the merits, as an alternative to continuing the lawsuit, no settlement of the lawsuit on this basis was ever formalized, and the offer, if it ever was such, was later withdrawn. No waiver by General Motors of its procedural defense to plaintiff's wrongful discharge claim can be found on these facts.

The Court having determined that its original findings of fact as to Panter's failure to timely file the statement of unadjusted grievance must be affirmed, having determined that Panter's culpability for this failure was not mitigated or excused by any prevailing shop practices or by the conduct of any other Union or Company official, and having rejected all other defenses of the Union, holds that Local 166 is liable for breach of duty of fair representation, as that duty has already been defined in this case by the Sixth Circuit Court of Appeals. Having so found, the Court further holds that General Motors is liable for wrongful discharge and breach of the GM/UAW collective bargaining agreement, as already determined by the Umpire. There remains, then, only the issue of appropriate relief: plaintiff's claim to reinstatement and the amount and allocation of his damage award.

III

Following his discharge by General Motors in March of 1970, Ruzicka remained unemployed for seventeen months. During this period, he pursued his extensive intra-union appeals, receiving welfare and unemployment benefits for support. In September, 1971, Ruzicka was briefly employed as a millright by the Kelsey-Hayes Company. On September 27, 1971, he obtained employment as a millright at Ford Motor Company, where he has since remained. Though Ruzicka has now accrued almost six year of seniority at Ford, in a job which is very much comparable to his former job at General Motors, he has never abandoned his desire to return to General Motors, and his first prayer for relief is reinstatement.

This equitable remedy is traditionally recognized as appropriate in actions for wrongful discharge under 29 U.S.C. § 185. General Motors, however, opposes reinstatement in this case, on the basis of Ruzicka's past work and disciplinary records at General Motors, Kelsey-Hayes, and Ford, his current employer. These records show that Ruzicka had a number of confrontations with management at General Motors prior to his discharge and had been disciplined for insubordination on several occasions.[10] He was apparently discharged for insubordination at

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[10] Ruzicka's prior disciplinary record at General Motors included:

(1) A one-day DLO in April 1968 for violation of Shop Rule No. 13 (Refusal to obey orders of foreman or other supervision).

(2) A 3-day DLO in May 1968 for violation of Shop Rule No. 29 (Abusive language to any employe or supervisor).

(3) A 3-day DLO in May 1969 for violation of Shop Rule No. 18 (Wasting time or loitering in toilets or on Company property during working hours).

(4) A reprimand in August 1969 for violation of Shop Rule No. 6 (Absent without reasonable cause).

Kelsey-Hayes. Since his employment began at Ford, Ruzicka has been assessed one disciplinary lay-off for intoxication while on the job and another for refusing to take a breathalizer test. Several of his disciplinary infractions at Ford, it is argued, would have been sufficient cause for discharge at General Motors. This employment history, in the Company's view, shows Ruzicka to be a contentious and unreliable worker, whose return to General Motors would be disruptive and unduly burdensome to the company. General Motors points to several past decisions of the National Labor Relatons Board where the equitable right to reinstatement was denied under similar circumstances as an unwarranted detriment to the employer. *Quick Shop Markets, Inc.*, 168 N.L.R.B. 180, 189 (1967); *Montgomery Ward Co., Inc.* v. *N.L.R.B.*, 374 F.2d 606 (10th Cir. 1974).

Despite these arguments and case authority, the Court believes that plaintiff is entitled to reinstatement in this case. As established by the Umpire's decision, Ruzicka'a past disciplinary record at General Motors, including his intoxication and insubordination on March 31, 1970, did not justify his discharge. The Company's decision to discharge him was thus wrongful at the time it was made, and the Company's attempt to establish a *post hoc* justification for this decision is unpersuasive. If Ruzicka turns out to be as contentious and unreliable a worker as the Company predicts, he can be disciplined or discharged accordingly. This Court however, must decline the Company's invitation to speculate on his future job performance in determining the propriety of reinstatement. Reinstatement was recommended as an appropriate remedy by the Umpire in his decision of November 11, 1976 and the Court sees no reason for qualifying or rejecting this recommendation. Accordingly, Ruzicka will be allowed to return to his former position at General Motors with full seniority.

Plaintiff also seeks damages for lost wages as a result of his discharge. The parties have stipulated to the maximum amount of lost wages to which he would be entitled, with adjustments made for interim earnings, unemployment benefits, and the 30-day suspension which plaintiff should have been assessed in lieu of his discharge. This stipulation, set out in full in the margin,[11] show that Ruzicka would have made $25,274.01* in gross wages had he continued working at General Motors. Defendants argue the plaintiff is entitled to little if any of this back pay, because he failed to sufficiently mitigate damages by actively seeking employment during the first seventeen months following his discharge and was discharged shortly thereafter from his job at Kelsey-Hayes for conduct which would also have prompted his discharge had he still been employed by General Motors. *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1317-1318, 1323 (D.C. Cir. 1972), and 505 F.2d 391, 395-403 (D.C. Cir. 1974); *NLRB* V. *Sourthern Silk Mills, Inc.*, 242 F.2d 697, 700 (6th Cir. 1957), cert. den. 355 U.S. 821 (1975). The Court, however, believes that plaintiff's efforts in seeking new employment subsequent to his discharge, coupled with his extensive efforts in seeking reinstatement at his former job, did constitute a sufficient attempt to mitigate damages for back pay. The Court cannot find Ruzicka's discharge from Kelsey-Hayes to be a "supervening cause" for all wages lost thereafter, as defendants argue, because the Court is not convinced that the episode which precipitated this discharge would have occurred had Ruzicka still been employed at General Motors. Accordingly, plaintiff may recover $25,274.01 in lost wages, less taxes, union dues, and other deductions regularly subtracted from back pay awards given by

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[11] See pages 101-105, *Infra*.

GM/UAW Umpires in arbitration.[11a]

Plaintiff also seeks recovery of $900 — $1000 for time and effort spent in exhausting his intra-union remedies. He estimates that he spent approximately 90-100 hours in preparing for and participating in his union appeals, and argues that he should be compensated for this time at the rate of $10.00 per hour, which is roughly his base rate of pay plus fringe benefits at General Motors prior to his discharge. This claim is denied. Plaintiff has presented no legal authority in support of this requested relief, and the one supporting decision found by the Court, *International Brotherhood of Boilermakers, etc.* v. *Rafferty*, 348 F.2d 307, 315 (9th Cir. 1965), is not persuasive. In any event, much of this time was spent during the seventeen months that plaintiff was unemployed, and he has already been awarded back pay at his former General Motors wage rate to compensate him for this time.

Plaintiff also claims damages for loss of $10.00 per month in automatic expense account payments he would have received as an official of Local 166. This claim is not well supported in the record and must be denied. Ruzicka was not in fact an official of Local 166 at the time of his discharge, and in view of his recall from former union office, he had no reasonable expectancy of becoming one in the immediate future. He may not, therefore, recover damages for lost union expense account payments.

Ruzicka also claims damages for his legal obligation to repay to the State of Michigan some $1600 in welfare benefits he received while unemployed following discharge. General Motors contends that if damages for its repayment obligation are to be awarded, they should be credited against any award of back pay, as a

[11a] To the extent that these deductions have not been specified in the stipulation, they may be agreed upon by the parties and provided in the order of judgment.

mitigation of damages for back pay. Moreover, both defendants object that plaintiff may not repay this money to the State, since the obligation to do so is rarely enforced. The Court is sensitive to plaintiff's legal obligation to repay these welfare benefits but agrees with the Company that a credit for them should be made against plaintiff's lost wage recovery. Accordingly, $1600 of plaintiff's back pay award will be awarded instead as compensation for his obligaton to repay his welfare benefits. To avoid any danger of non-repayment, the order of judgment may direct that these funds be paid directly to the appropriate State agency.

Plaintiff also claims damages for attorney fees incurred in litigating this action. Under a recent decision of the United States Court of Appeals for the Sixth Circuit, *Scott* v. *Local Union 377*, 548 F.2d 1244 (6th Cir. 1977), damages for attorney fees may be awarded in an action under 29 U.S.C. § 185 for breach of duty of fair representation, as costs which the plaintiff would not have incurred but for his unfair representation. As the Court of Appeals stated:

> [I]n his action against Union . . . the principal element of Scott's damages is the amount which it cost him in attorney fees and other expenses to do that which the union was obliged but failed to do on his behalf. He was, therefore, entitled to include in his damages against the Union the amount which he reasonably expended in attorney fees and other costs in prosecuting his claim against the company, costs which he would not have incurred but for the Union's breach of its duty to represent him fairly and in good faith. *Czosek* v. *O'Mara*, 397 U.S. 25, 29, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970); See also, *Harrison* v. *United*

Transportation Union, 530 F.2d 558, 562 (4th Cir. 1975), cert. denied, 425 U.S. 958, 96 S.Ct. 1739, 48 L.Ed.2d 203 (1976); *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 193 n.17 (1st Cir. 1970).

Scott v. *Local Union 377*, *supra* at 1246. An award of attorney fees in a § 185 action, however, is limited to those fees actually incurred by plaintiff for legal services in prosecuting the action. Under *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Scott* v. *Local Union 377*, *supra*, the court, in the absence of statutory authority, cannot award any larger sum to plaintiff or his lawyer under the "private attorney general" doctrine, as a premium for bringing the suit.

During a recent hearing on damages, Ruzicka testified that he never signed a written retainer agreement with his counsel, Mr. Dinges, or with his counsel's law firm. When Ruzicka first approached the firm for legal advice, he spoke with Dinges' associate, Mr. Adelman, who represented to him that his case would be taken on a one-third contingency fee arrangement. Nothing else was ever said or done with regard to a fee contract until the morning of the recent hearing on damages, when Ruzicka's counsel presented him with a bill for legal services, figured on the basis of time and expenses, of $28,000. At the conclusion of this testimony, the Court entered a finding on the record that an oral contract had been made between plaintiff and his counsel providing for a one-third contingency fee. Plaintiff may recover for this expense accordingly.

Plaintiff also seeks recovery of court costs. Insofar as these have not already been taxed incident to the initial trial or the appeal, plaintiff may recover his costs, Federal Rule of Civil Procedure 54(d), and these may be taxed in the usual way. 28 U.S.C. § 1920 *et seq.*

Plaintiff will also be awarded interest, but only from the date of judgment. 28 U.S.C. § 1961; *Ramey* v. *Cincinnati Enquirer, Inc.*, 508 F2d 1188, 1198 (6th Cir. 1974); *Shatterproof Glass Corp.* v. *Libbey-Owens-Ford Co.*, 482 F.2d 317, 324 (6th Cir. 1973).

Plaintiff also claims punitive damages of $100,000 against Local 166. The Court has found no decision of the Sixth Circuit which directly allows punitive damages against a union in an action for unfair representation under 29 U.S.C. § 185 (but see: *Dill* v. *Greyhound Corp.*, 435 F.2d 231, 239 (6th Cir. 1970)). However, the majority of other circuits have held that an award of punitive damages in such an action is proper where actual malice or bad faith is proved. *Coake* v. *Orange Belt District Council of Painters*, 529 F.2d 815, 820 (9th Cir. 1976); *International Brotherhood of Boilermakers, etc.* v. *Braswell*, 388 F.2d 193, 200 (5th Cir.), cert. den., 391 U.S. 935 (1968); *Morrissey* v. *National Maritime Union of America*, 544 F.2d 19, 24-25 (2nd Cir. 1976); *Butler* v. *Local Union*, 514 F.2d 442, 454 (8th Cir. 1975); Compare: *Harrison* v. *United Transp. Union*, 530 F2d 558, 563 (4th Cir. 1975) (actual malice not a prerequisite to award of punitive damages). Adopting this standard here, and having found no evidence of actual malice or bad faith on the part of Local 166, either in its representation of plaintiff's grievance or in its defense of this suit, the Court denies plaintiff's request for punitive damages.

There has been a good deal of discussion and argument in this case regarding the proper apportionment of plaintiff's damages. The issue was treated extensively by defendants at final arguments and in their post-trial brief. It is the Union's position that the Company should be liable for all damages flowing from plaintiff's wrongful discharge, principally back pay, *Vaca* v. *Sipes*, *supra*, at 197, and should also be liable for all

incremental damages, or at least those incurred subsequent to the Union's many demands, made both directly and in the context of this suit, that the Company waive its procedural objection to plaintiff's grievance and agree to its arbitration on the merits. Under *Hines* v. *Anchor Motor Freight, supra* at 570, the Company may not rely upon such procedural objections where the integrity of the grievance procedure has been undermined by the Union's breach of duty of fair representation. Thus, the Local argues, General Motors is wholly at fault in this case as the party which wrongfully discharged plaintiff in the first place and thereafter, and without valid legal excuse, refused to process his grievance for reinstatement. *St. Clair* v. *Teamsters*, 422 F.2d 128, 121 (6th Cir. 1969).

General Motors, not surprisingly, urges a different formula for apportioning plaintiff's damages. It is the Company's position that plaintiff's discharge, though wrongful, would have been corrected years ago and in due course by an Umpire's award in plaintiff's favor had not the Union breached its duty of fair representation in mishandling his grievance for reinstatement. Though the grievance procedure was eventually ruled defective as a result of the Union's unfair representation, General Motors contends that it was entitled nevertheless to rely in the interim on the finality provisions of the grievance procedure in considering plaintiff's grievance dead. Thus, in the Company's view, the Union is liable for all damages, including back pay, from May 5, 1970, when it breached its duty of fair representation, until the date of this decision, when that breach will be finally found as a matter of law. *Hines* v. *Anchor Motor Freight, supra* at 572-573 (concurring opinion of Stewart, J.).

The Court, after due consideration, must reject both of these positions as a guide to apportioning plaintiff's damages in this case. The formulae offered by both defendants, while plausible and apparently supported in the cases, are nevertheless based almost wholly on the sequence or timing of their respective wrongful acts toward plaintiff. This is myopic. It was the combined effect of General Motors wrongful discharge and the Union's breach of duty of fair representation which has operated all of these years to deprive plaintiff of his job with the Company and his rights under the contract, and the Court is not about to apportion damages by trying to determine which tooth of this buzz saw was responsible, at any given moment, for the damages plaintiff was incurring at the time. The Court believes that a proper apportionment of damages must consider not only the chronology of the defendants' wrongful acts but also the gravity and nature of their wrongdoing. Each defendant contributed in its own way to the injuries suffered by plaintiff, and each must answer for damages accordingly.

Since both the Union and the Company caused this damage each must bear one-half of the total and post-judgment interest. Plaintiff may have a judgment against both defendants for back pay of $23,674.01. Each defendant is directed to repay the welfare fund $800 each for a total of $1600. Plaintiff additionally may have a judgment against both defendants for attorney fees calculated as one-third of $25,274.091 (sic) or $8,424.57. Plaintiff may have court costs taxed in the usual way. Plaintiff will also be reinstated in his job at General Motors with full seniority. An appropriate order may be submitted.

/s/ John Feikens
United States District Judge

Dated: October 5, 1977
Detroit, Michigan

STIPULATION

(United States District Court
Eastern District of Michigan
Southern Division)

(William Ruzicka, Plaintiff, vs. General Motors Corporation, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, and its Local Union 166, Defendants, Civil Action File No. 36598)

It is Hereby Stipulated by and between the parties hereto, through their respective counsel:

1. That at the termination of his employment on March 30, 1970, by General Motors Corporation, the plaintiff, William Ruzicka, was similarly classified and possessed comparable seniority to millright employes F. C. Smith, W. J. Lemerand, B. Little and M. L. Tarrant.

2. The average gross earnings of employes F. C. Smith, W. J. Lemerand, B. Little and M. L. Tarrant were as follows:

1970	1971	1972	1973
$12,001.22	$17,519.11	$20,954.42	$22,109.29

1974	1975	1976
$23,982.07	$18,035.41	$22,795.54

That the summary of average salaries for the above GM employes is as follows:

	Average Wages	Number of Weeks	Average Per Week
1970	$12, 001.22	*42	$285.74
1971	17, 519.11	52	336.90
1972	20,954.42	52	402.96
1973	22,109.29	52	425.17
1974	23,982.07	52	461.19
1975	18,035.41	52	346.83
1976	22,795.54	52	438.37

*strike 9/15/70 to 11/20/70

3. That in September, 1971, the plaintiff was employed at Kelsey-Hayes and his gross earnings were $868.86.

4. That on September 27, 1971, plaintiff became employed at Ford Motor Company and has continued that employment to the present. At Ford Motor Company plaintiff has been classified as a millright at rates comparable to what he would have earned at General Motors Corporation.

5. That the summary of the plaintiff's gross earnings, number of weeks worked, and average earnings per week at Ford Motor Company are as follows:

	Wages at Ford & GM	Number of Weeks Worked	Average Earnings Per Week
1970	$ 2,965.55	13	$228.11
1971	4,006.92	14	286.20
1972	11,839.32	36	328.87
1973	10,339.70	27	382.95
1974	16,118.44	47	342.95
1975	14,176.90	32	443.02
1976	12,222.98	25	381.96

6. That the differential in income between that which plaintiff might have earned at GM had he remained employed and his actual income is:

A. 1970 —	$12,001.22	Wage available at GM
	2,965.55	Gross earnings at GM
	$ 9,035.67	
	- 1,000.10	30 day penalty
	$ 8,035.57	
	- 1,749.00	Unemployment Benefits
	$ 6,286.57	DIFFERENTIAL
B. 1971 —	$17,519.11	Wages available at GM
	- 860.86	Kelsey-Hayes gross earnings
	$16,658.25	
	- 4,006.92	Ford gross earnings
	$12,651.33	DIFFERENTIAL
C. 1972 —	$402.96	Average earnings — GM
	-328.87	Average earnings — plaintiff
	$ 74.09	Difference
	× 36	Weeks worked by plaintiff
	$2,667.24	DIFFERENTIAL
D. 1973 —	$425.17	Average earnings — GM
	-382.95	Average earnings — plaintiff
	$ 42.22	Difference
	× 27	Weeks worked by plaintiff
	$1,139.94	DIFFERENTIAL
E. 1974 —	$461.19	Average earnings — GM
	-342.95	Average earnings — plaintiff
	$118.24	Difference
	× 47	Weeks worked by plaintiff
	$5,557.28	DIFFERENTIAL

7. That in 1975 the plaintiff's average earnings at Ford exceeded the average earnings at GM and therefore there is no pay differential.

8. That in 1976 the plaintiff's average earnings at Ford exceeded the average earnings at GM and therefore there is no pay differential.

9. The total differential in wages between what plaintiff might have earned at GM and actual income is set out below:

1970 —	$ 6,286.57
1971 —	12,651.33
1972 —	2,667.24
1973 —	1,139.94
1974 —	5,557.28
1975 —	-0-
1976 —	-0-
TOTAL	$28,302.36

10. GM payroll records demonstrate the following information concerning the earnings of plaintiff during the period 1965-69 and the average earnings of Smith, Lemerand, Little and Tarrant:

	Average Earnings of Smith, etc.	Ruzicka's Earnings	Ruzicka's Percentage of Smith, etc.'s Average
1969	$13,915.73	$12,567.01	90.3
1968	10,971.12	9,017.81	82.2
1967	9,385.74	8,831.66	94.1
1966	9,559.43	8,720.04	91.2
1965	9,873.11	8,801.87	89.1
Overall Averages	$10,741.03	$ 9,587.68	89.3

11. That the plaintiff received $1,600 in welfare benefits in 1970 and 1971.

12. That the plaintiff's Social Security loss is as follows:

MAXIMUM	EARNINGS	DIFFERENCE	RATE	LOSS
		1970		
$7,800.00	$2,965.55	$4,884.45	5.2%	$251.39
		1971		
$7,800.00	$4,867.79	$2,932.21	5.2%	$152.47

Dated: April 25, 1977

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OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Decided and Filed June 2, 1981.)

(William Ruzicka, Plaintiff-Appellee Cross-Appellant, v. General Motors Corporation Defendant-Cross Appellee, Local 166 of the United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Defendant-Appellant Cross-Appellee. William Ruzicka, Plaintiff-Appellee, v. General Motors, Defendant-Appellant — Appeal from the United States District Court for the Eastern District of Michigan — Nos. 78-1198-1199-1200)

Before: Martin, Circuit Judge, Celebrezze, Senior Circuit Judge, and Duncan, District Judge.*

(2) Celebrezze, Senior Circuit Judge.

This is the second appeal in this case concerning unfair representation and breach of a collective bargaining agreement. Plaintiff-appellee, William Ruzicka, filed this action in federal court on June 31, 1971 alleging that he had been unfairly represented by the defendant-appellant, International Union, United Automobile, Aerospace and Argicultural Implement Workers of America and it Local Union 166 during his attempt to gain reinstatement to his employment with defendant-appellant, General Motors Corporation through the collective grievance procedure. Ruzicka also alleged that his discharge by General Motors was wrongful because rulings of the collective bargaining agreement's impartial umpire showed that the correct disciplinary action for the type of conduct he allegedly

* Robert M. Duncan, United States District Judge, United States District Court for the Southern District of Ohio, sitting by designation.

committed would be temporary suspension. Jurisdiction of the action against both union defendants and General Motors was based upon Section 301 of the Labor Management Relations Acts of 1947, 29 U.S.C. Sec. 185.

The facts of the case are accurately set out in our first opinion in this case and will be reiterated here only where necessary to discuss the issues presented by this appeal. On March 31, 1970, Appellee William Ruzicka was discharged for being intoxicated on the job and using threatening and abusive language towards his supervisors at GM's Willow Run Plant in Ypsilanti, Michigan. He had worked there for nearly eleven years and been actively involved in Union activities for much of that time.

Ruzicka initiated the grievance process under the National Agreement between GM and the United Auto Workers by filing a timely grievance protesting his discharge. He did not dispute the essential facts of intoxication and abusive language, but argued that discharge was an "unduly harsh" penalty which was inconsistent with past decision of umpires interpreting the National Agreement. The Company completed the second step of the grievance process by filing an answer under Paragraph 77 of the National Agreement. The (3) Union began the third step by filing a "notice of unadjusted grievance." To invoke arbitration, the Union was required by Paragraph 37 to file a "statement of unadjusted grievance" simultaneously with GM. The District Court found that Local 166 never filed such a statement, although it had sought and received two time extensions to do so. After the due date for the statement had passed, GM disclaimed further obligation under the National Agreement.

Ruzicka immediately pursued his intra-Union remedies under Article 31 of the UAW Constitution,

arguing that Charles Panter, a Local 166 official, had willfully failed to perform his duty in failing to file the required statement. A trial before a Local 166 Committee resulted in a finding that Panter had been negligent but not guilty of willful inaction. Appeals to higher levels failed.

Ruzicka instituted further intra-Union action against Local 166 for wrongful processing of his grievance, but this action was unsuccessful at the Local level. An appeal to the higher levels was stayed pending resolution of a policy grievance that Panter's successor at Local 166 had filed. The policy grievance, which requested GM's consideration of Ruzicka's grievance despite the procedural problem, was withdrawn by Local 166 on April 24, 1971.

Rather than appeal the adverse decision of Local 166's processing of the grievance to the UAW's International Executive Board, Ruzicka filed a complaint in federal court. He alleged that Panter's personal "hostility" towards him had caused Panter not to file the statement of unadjusted grievance. He asserted that both the Local and International Unions had thus given him unfair representation, and he alleged that GM's discharge was wrongful and that GM had conspired to discharge him because of his Union activities. The Unions filed a cross-claim against GM, seeking that the dispute be ordered to arbitration.

At a hearing limited to the issue of unfair representation, and after the completion of plaintiff's case, all defendants (4) were granted an involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the ground that Ruzicka had not met the burden of showing unfair representation by either union. *Ruzicka* v. *General Motors*, 86 L.R.R.M. 2030 (E.D. Mich. 1973). Specifically, the district court found no bad

faith on the part of either union and held that, in the absence of bad faith, a union could not be held liable for a breach of the duty of fair representation.

On appeal and cross-appeal, this court reversed and remanded, rejecting the district court's incorporation of bad faith as an essential element of unfair representation: "We do not find the duty of fair representation so limited. In *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967), the Supreme Court held that union actions which are "arbitrary, discriminatory, or in bad faith" could establish a breach of the duty of fair representation. . . . We believe that the district court misread *Vaca* when it held that "bad faith" must be read into the separate and independent standards of "arbitrary" or "discriminatory" treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation." *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 309-10 (6th Cir. 1975), reh. denied, 528 F.2d 912 (6th Cir. 1975).[1] (*Ruzicka I.*). We also granted summary judgment in favor of the unions based upon their cross-claim against General Motors seeking arbitration. The trial court was directed to order arbitration with the GM-UAW umpire while retaining jurisdiction, and if the National Agreement was interpreted to mean that GM was relieved of its contractual duties because of the union's failure to follow grievance procedures, appropriate relief against Local 166 on the unfair representaion claim could then be awarded. 523 F.2d at 315.

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[1] Dismissal of the International Union was affirmed because there had been no showing of involvement of the International Union officers in the processing of plaintiff's grievance.

On remand, the district court ordered the contractual merits (5) of plaintiff's discharge to be submitted to the umpire. The court did not direct that the umpire was first to be presented with the union's claim that Ruzicka's grievance was procedurally alive despite the untimely processing. The court reasoned that GM's procedural defense — that the finality provision of the collective bargaining agreement barred the wrongful discharge claim — was dependent upon the outcome of plaintiff's unfair representation claim against the union. Since that claim could only be determined by the court, the court would also be the appropriate authority for deciding whether the union's conduct nullified the finality provision. The trial court relied upon the intervening decison of *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), where the Supreme Court held that finality provisions of grievance-arbitration provisions in collective agreement may be nullified if "the process has fundamentally malfunctioned by reason of the bad faith performance of the union. . . ." 424 U.S. at 569.

On the merits of Ruzicka's contractual claim, the GM-UAW umpire held that under the collective bargaining agreement the harsh penalty of discharge given William Ruizicka was not justified under the circumstances. Accordingly, the umpire ordered reinstatement and backpay. Having procurred a favorable recommendation from the umpire, Ruzicka then moved for summary judgment against General Motors and the UAW. The district court denied this motion and ordered a second trial. At that trial, the district court heard the local union's rebuttal of Ruzicka's unfair representation case. At the close of the union's case, the trial court found as a matter of fact that Panter had negligently failed to timely file a statement of plaintiff's grievance and that as a matter of law such

malfeasance amounted to unfair representation. The court then rendered a judgment against General Motors on the contractual cause of action based solely upon the umpire's opinion, which appeared as an appendix to the district court's opinion. *Ruzicka* v. *General Motors*, 96 L.L.R.M. (6) 2822, 2843 (E.D. Mich. 1977). In assessing damages against Local 166 and General Motors, the court ordered each to bear one-half of both the backpay award of $25,274.91 and attorney's fees award of $8,424.57; Ruzicka's reinstatement to employment with full seniority was also ordered. The trial court then granted GM's motion for a stay, after reviewing evidence that plaintiff had, since September, 1971, procured comparable employment at another automobile manufacturer.

All three parties have appealed. GM and UAW argue that the facts found by the district court cannot constitute a breach of the union's duty of fair representation. Second, General Motors argues that the facts supporting the conclusion of unfair representation cannot, under the rule of *Hines* v. *Anchor Motor Freight*, seriously undermine the grievance-arbitration procedure so as to remove the bar of finality of the contract. GM also argues that Ruzicka failed to meet his burden of showing a breach of the collective bargaining agreement. On the issue of relief, the appellants' arguments diverge. GM argues that it cannot be held liable for attorney's fees in a suit on the collective agreement, while the UAW alleges that the district court eroneously refused to apportion liability for the attorney's fees. Both GM and UAW argue that they should not be liable for contractual backpay. Finally, General Motors asserts that the trial court abused its discretion in ordering Ruzicka's reinstatement. The plaintiff has raised several separate issues on cross-appeal. First, Ruzicka claims that

he is entitled to prejudgment interest. Second, he claims entitlement to extra-ordinary attorney's fees, and third, he argues that his backpay should have been calculated on the basis of wages available to comparable employees.

I.

Following the remand, plaintiff moved for summary judgment against Local 166 on his unfair representation claim, (7) insisting that our opinion in *Ruzicka I* controlled and that any evidence the union could offer at a new trial would be merely corroborative of the direct evidence submitted at the first hearing. The district court denied this motion, holding that summary judgment on the union's liability could not be entered on the basis of plaintiff's initial proofs at trial and the intervening decision of this court. Noting that while *Ruzicka I* did contain statements which appeared to hold unequivocally that Local 166 was liable for a breach of the duty of fair representation, the court held that those statement had to be read in light of the incomplete record before the court of appeals following dismissal of plaintiff's action under Rule 41(b). Accordingly, the Local was permitted to present further evidence in it defense.

At the second hearing on the unfair representation claim, the union offered the testimony of four union officials and the union secretary. Their testimony in some ways tended to corroborate the claim made in the first hearing and rejected by the district court that Panter had, in fact, filed the union's statement of Ruzicka's unadjusted grievance. In light of inconsistencies in that testimony, the court again rejected the argument, reaffirming its finding of fact as to Panter's failure to timely file the union's statement. Evidence was also introduced by the union regarding a prevailing practice of freely granting extensions of time for the exchange

of grievance statements. In its initial memorandum opinion, the district court had found that extensions of exchange deadlines were freely given by both the Union and GM during Panter's tenure as committee chairman. This finding was reinforced by testimony received on remand that the prevailing practice was for both parties to grant extensions at will if one party was not prepared to exchange statements, even after the exchange date had passed. The union argued that Panter had relied on this prevailing practice in failing to file the union's statement and that this reliance excused the failure to submit the statement on time. The union also presented testimony that it (8) had made belated attempts, without success, to exchange the Ruzicka statement with GM.

The district court noted that if it were a matter of first impression, it very well might agree with the union that Panter's conduct was not so grossly negligent that it constituted unfair representation, but felt that the argument based on the prevailing past practice had been foreclosed by our decision in *Ruzicka I*. Specifically, the court felt that because some evidence regarding the past practice had been in the record before our court on the first appeal, we must have considered it and implicitly rejected it as sufficient justification for the union's tardy attempt to file the statement. Local 166 now argues that our opinion in *Ruzicka I* did not provide a mandatory blueprint for all aspects of the case which the trial court was required to follow. That is, since the first appeal was from a Rule 41(b) dismissal, *Ruzicka I* established no more than prima facie liability on unfair representation and did not preclude consideration of rebuttal evidence. The union points out that our opinion in *Ruzicka I* never discussed the scant evidence on the prevailing practice offered at the initial hearing.

In *Ruzicka I* we held that, absent justification or excuse, a union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation. 523 F.2d at 310. In our order denying the petition for rehearing, we observed that "[o]ur opinion in this action speaks to a narrow range of cases in which unexplained union inaction, amounting to arbitrary treatment, has barred an employee from access to an established union-management apparatus for resolving grievances." 528 F. 2d at 913. The key to *Ruzicka I*, then, was our holding that "unexplained union inaction" which substantially prejudices a member's grievance could amount to the type of arbitrary conduct which evidences unfair representation. The procedural posture of the appeal, coming to us as it did with (9) an incomplete record, did not present an opportunity for us to make a final ruling as to the legal viability of any explanation the union might proffer. The district court was correct in ruling that since the dismissal was under Rule 41(b), our holding was only that Ruzicka's evidence was legally sufficient to constitute a prima facie case of unfair representation and the remand to the district court was for further proceedings in which the defendant could then present any evidence it might have. *See* 5 Moore's Federal Practice Par. 41.13 (2) at 41-183 (1977). Since the district court felt any inquiry regarding the union's reliance on a past practice was foreclosed by *Ruzicka I* it did not make a finding as to whether there was, in fact, actual reliance by Panter or other union officials on the prevailing practice of freely granting extensions. Our review convinces us that a remand is necessary for the district court to conduct a hearing on this narrow issue. Only after the union has presented its evidence as to reliance on a past practice can a final ruling be made on the unfair representation claim.

If the district court concludes that the bargaining representative's failure to timely file the grievance statement was due to reliance on the prevailing practice of freely granted extensons,(sic) that will be suffcient to relieve the union from liability.[2] Such conduct does not amount to the arbitrariness which *Ruzicka I* held will constitute a breach of the duty of fair representation.[3] Nor does it amount to the perfunctory (10) calculation of a "non-grievance" as *Williams* v. *Teamsters Local Union No. 984*, 625 F.2d 138 (6th Cir. 1980). Concomitantly, it does not equal the inept handling of a grievance by a union ignorant of the contract provisions relevant to the case as in *Milstead* v. *International Brotherhood of Teamsters*, 580 F.2d 232 (6th Cir. 1978). In relying on a past practice, a union's omission is based on a wholly relevant consideration, is not intended to harm its member, and is not the type of arbitrariness which reflects reckless disregard for the rights of the individual employee. Such conduct, at times, manifests no more than ordinary negligence and we cannot hold a union liable for breach of the duty of fair representation based upon simple negligence. The law in this circuit proscribes that result. In *Dill* v. *Greyhound Corp.* 435 F.2d 231, 238 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971) we held that bad faith was required to support a claim of unfair representation where the union had made a

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[2] The Supreme Court has recognized the concept of past practice as an important principle of contract application. *United Steelworkers of America* v. *Warner & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). *See also NLRB* V. *Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669, 676 (10th Cir. 1980), *quoting Pekar* v. *Local 81 Int'l Union of United Brewery*, 311 F.2d 628, 636 (6th Cir. 1962), *cert. denied*, 373 U.S. 919 (1963); *Oakland Press Co.* v. *NLRB*, 606 F.2d 689, 691 (6th Cir. 1979).

[3] An arbitrary decision is one which arises from caprice or is without reason. In rejecting bad faith as an essential element of an unfair representation case, *Ruzicka I* recognized that the latter definition of arbitrariness may apply to unfair representation claims.

decision that the individual's grievance was without merit. *See also Whitten* v. *Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975) *cert. denied*, 425 U.S. 981 (1976); *Balowski* v. *International United A. A. & A. Imp. Wkrs.*, 372 F.2d 829 (6th Cir. 1967). Admittedly, in those cases the merits of the employee's grievance had, in fact, been evaluated and decided adversely to the employee by the unions, which chose not to pursue the grievances. In the present case the union *inaction* served to terminate the grievance. Yet we see no reason to apply a stricter standard to a union's untimely filing of a statement based on past practice than is applied to a union's decision not to pursue a grievance that it believes to be without merit. In both cases, the union can articulate a sufficient legal rationale to justify the manner in which a grievance has been handled. Whatever the rationale, the standard against which it is judged should be uniform. A contrary conclusion would inject the court's into the process of second-guessing a union's ability to rely on prevailing practices. This view is supported by the de-
(11) cisions of the other circuits which are unanimous in holding that ordinary negligence, without more, cannot establish a breach of the duty of fair representation. *Stephens* v. *Postmaster General*, 623 F.2d 594, 596 (9th Cir. 1980); *Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980); *Smith* v. *Hussman Refrigerator Co.* 619 F.2d 1229, 1245 (8th Cir. 1980) (en banc) *cert. denied sub nom; United Steelworkers of American* v. *Smith*, 101 S.Ct. 116 (1980); *Ethier* v. *United States Postal Service*, 590 F.2d 733, 736 (8th Cir. *cert. denied*, 444 U.S. 826 (1979); *Baldini* v. *Local Union No. 1095*, 581 F.2d 145, 151 (7th Cir. 1978); *Robesky* v. *Quantas Empire Airways Ltd.*, 573 F.2d 1082, 1089-90 (9th Cir. 1978); *Coe* v. *United Rubber, Cork, Linoleum & Plastic*, 571 F.2d 1349, 1350 (5th Cir. 1978); *Dwyer* v. *Climatrol Industries, Inc.*, 544 F.2d 307, 311 (7th Cir. 1976) *cert. denied*, 430 U.S. 932 (1977); *Bazarte* v.

United Transportation Union, 429 F.2d 868, 872 (3rd Cir. 1970); *Hause* v. *Blue-Arrow-Douglas, Inc.*, 103 L.R.R.M. 2837 (W.D. Mich 1980); *Walker* v. *United Steelworkers of America Local No. 7857*, 98 L.R.R.M. 2463 (E.D. Ky. 1978). Of course, when a bargaining representative acts arbitrarily in failing to process a grievance submitted to it by an employee without a sound reason for its decision, i.e. without reliance on a prevailing practice, our holding in *Ruzicka I* will render the union liable for unfair representation.

II.

As a general rule, an employer may rely on the finality provision of a grievance and arbitration clause in a collective bargaining agreement. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). An exception to that rule is created when the contractual process has been "seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct." *Hines, supra*, 424 U.S. at 570. In that event, the union's breach "removes the bar of the finality provisions of the contract." *Id.* at 567. The protection afforded (12) the employer by the finality provisions of the collective bargaining agreement is contingent upon the union's discharge of its duty to represent the employee fairly. In other words, in order to avoid the finality of the grievance process and sue GM for breach of the contract, Ruzicka must first show that the Local's unfair representation seriously undermined the integrity of the arbitral process.[4] *Id.* at 567, *Mitchell* v. *United Parcel*

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[4] The union need not always be a party to such an action. *See Smart* v. *Ellis Trucking Co. Inc.*, 580 F.2d 215, 218-19 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). *But see Clayton* v. *ITT Gilfillan*, 623 F.2d 563 (9th Cir.), *cert. granted*, 101 S.Ct. 352 (1980).

Service, 624 F.2d 394, 397 (2d Cir.) *cert. granted*, 101 S. Ct. 265 (1980); *Clayton* v. *ITT Gilfillan*, 623 F.2d 563, 570 (9th Cir.), *cert granted*, 101 S. Ct. 352 (1980); *King* v. *Space Carriers, Inc.*, 608 F.2d 283, 289 (8th Cir. 1979). *See also Hayes* v. *New England Millwork*, 602 F.2d 15, 18 (1st Cir. 1979).

Since the contract finality claim and attendant issues are necessarily contingent upon the district court's ruling on the unfair representation claim, we must refrain from considering them until the district court has decided the unfair representation claim.

The decision of the district court is vacated and remanded for proceedings consistent with this opinion.

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed August 13, 1981)

(William Ruzicka, Plaintiff, v. General Motors Corporation, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, U.A.W., and its Local Union 166, Defendants — Civil Action No. 36598)

William Ruzicka was discharged by General Motors Corporation ("G.M.") in 1970 for being intoxicated on the job and using threatening and abusive language to his supervisors. He filed a grievance through United Automobile Workers ("U.A.W.") Local 166, claiming that discharge was an unduly harsh penalty for his behavior. After he tried for over a year to obtain a hearing on the

merits of his grievance, he filed this action under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), against G.M., the U.A.W. International Union, and U.A.W. Local 166. For nearly the past decade, the case has been in this court and the United States Court of Appeals for the Sixth Circuit. *Ruzicka* v. *General Motors Corp.*, 336 F.Supp. 824 (E.D. Mich. 1972), 85 L.R.R.M. 2419 (E.D. Mich. 1973), 86 L.R.R.M. 2030 (E.D. Mich. 1973), *rev'd*, 523 F.2d 306 (6th Cir. 1975), *reh. denied*, 528 F.2d 912 (6th Cir. 1975), 96 L.R.R.M. 2822 (E.D. Mich. 1977), *vacated*, 649 F.2d 1207 (6th Cir. 1981).

Plaintiff Ruzicka filed his grievance in accordance with the terms of a collective bargaining agreement between G.M. and the U.A.W. This controversy began when Charles Panter, chairman of the shop committee, failed to make a timely simultaneous exchange of "statements of unadjusted grievance" with Ross Hagerman, supervisor of labor relations at the G.M. plant where plaintiff worked.[1] After the deadline for this exchange passed, G.M. refused to consider plaintiff's grievance on its merits, insisting that it was no longer timely. At trial, evidence was presented of a loose practice at the plant of exchanging statements after deadline had passed.

> Hagerman also testified that . . . [i]f one side was not prepared with its statement on an exchange date, extensions of time it appeared were freely granted. In fact such extensions were freely granted even after an exchange date had passed. This testimony was corroborated by William Moon, who succeeded Charles Panter as chairman of the shop committee on May 17, 1970.

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[1] At trial, Panter contended that he had exchanged his statement on time, or at least that he had complied substantially with the deadline. I found that he had not done so. 86 L.R.R.M. at 2031. The Court of Appeals affirmed this finding. 523 F.2d at 310.

86 L.R.R.M. at 2031. I concluded that, even if Panter was negligent, his behavior was not egregious enough to be a breach of the Local's duty of fair representation. Thus, I dismissed the case at the close of plaintiff's proofs, under Fed. R. Civ. P. 41(b). 86 L.R.R.M. 2030.

The United States Court of Appeals for the Sixth Circuit reversed. 523 F.2d 306 [*Ruzicka I*].[2] It held that plaintiff had established a *prima facie* case against Local 166.

> [T]he Local allowed the final deadline to pass without filing the Statement. . . . Such negligent handling of the grievance . . . amounts to unfair representation.
>
> * * *
>
> . . . The Union made no decision as to the merits of [plaintiff's] grievance, but merely allowed it to expire out of negligent and perfunctory handling. Thus, we must reverse the District Court's conclusion that Local 166 did not unfairly represent [plaintiff].

523 F.2d at 310. The case was remanded to enable the Local to present it evidence.

On remand, Local 166 presented little new evidence. Based on the strong language used by the Court of Appeals, I found that Local 166 had breached its duty.

> The Court therefore reaffirms its initial findings of fact as stated in its memorandum opinion of November 21, 1973, concluding that Panter neglected to file the Ruzicka statement of unadjusted grievance prior to the May 5, 1970 deadline.

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[2] I also found that the International Union had not breached its duty. This conclusion was affirmed. 523 F.2d at 309.

> Having affirmed this fact, it would appear that the Union must be held liable for breach of duty of fair representation, as the duty has already been defined in this case by the Court of Appeals.

96 L.R.R.M. at 2830.

The case returned to the Court of Appeals. 649 F.2d 1207 [*Ruzicka II*]. This time, the Court significantly clarified its earlier discussion.

> The key to *Ruzicka I*, then, was our holding that "unexplained union inaction" which substantially prejudice a member's grievance could amount to the type of arbitrary conduct which evidences unfair representation. . . .
>
> If the district court concludes that the bargaining representative's failure to timely file the grievance statement was due to reliance on the prevailing practice of freely granted extensions, that will be sufficient to relieve the union from liability.

649 F.2d at 1211.

My decision was vacated, and the case was again remanded for a finding on "reliance by Panter or other union officials on the prevailing practice of freely granting extensions."

With all due respect, I do not believe that Panter's behavior has remained unexplained. I believe that I made a finding on this issue in 1973, and again in 1977. When I first dismissed plaintiff's claims, I summarized the testimony of Hagerman and Moon about non-enforcement of the exchange deadline. 86 L.R.R.M. at 2031, quoted above. I then stated, "The fact that Panter did not make the exchange, standing alone, does not show breach of the unions duty of fair representation." 86 L.R.R.M. at 2031. To the extent that

this discussion may have left the matter in doubt, I explained my opinion on this issue again in 1977, and expressed my view that the Court of Appeals had already rejected the "reliance" defense.

> According to the Union, if Panter did not timely file the Ruzicka statement, he failed to do so in reliance on this prevailing shop practice. . . .
>
> This argument is not wholly unpersuasive to the Court, and were it free to decide this issue as one of first impression, the Court might very well agree with the Union. . . . But this argument, in the Court's view, has been foreclosed to the Union by the Court of Appeals decision [in *Ruzicka I*].

96 L.R.R.M. at 2830.

Now, the Court of Appeals has placed the issue of Panter's reliance before me again. After considering additional testimony, I find that Panter did not make a timely simultaneous exchange of the statements with Hagerman, and that his failure to do so may be attributed, at least in part, to the customary non-enforcement of exchange deadlines at the plant. Panter claimed that he made the exchange, but he apparently kept no record of the event. He explained that most exchanges at the plant did not conform with the technical requirements of the collective bargaining agreement. 86 L.R.R.M. at 2031. Whatever his recollection of this particular exchange, his lack of attention to procedural detail clearly arose from a belief, shared by Hagerman and Moon, 86 L.R.R.M. at 2031, that deadlines were not important. *See* Transcript, at 412-22. He has now restated this earlier testimony explicitly in terms of "reliance".

Because Panter relied on the non-enforcement of exchange deadlines at the plant, and because plaintiff has presented no evidence that the Local's response to

G.M.'s position on timeliness violated its duty, I conclude that Local 166 did not breach its duty to represent plaintiff fairly in processing his grievance. *See Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). Thus, plaintiff's § 301 actions against Local 166 and G.M. must be dismissed. *See Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-69 (1976); *Humphrey* v. *Moore*, 375 U.S. 335, 350-51 (1964).

One other issue remains. After plaintiff brought this action, the International Union and Local 166 filed a cross-claim against G.M. to compel arbitration of plaintiff's grievance. When I first dismissed plaintiff's claims, I also dismissed the unions' cross-claim. Unpublished order of November 29, 1973. In *Ruzicka I*, after it reversed my finding that Local 166 had not breached it duty of fair representation, the Court of Appeals also reversed my dismissal of the cross-claim.

> In view of our reversal of the unfair representation conclusion, we need not decide whether the Unions' cross-claim was well taken had there been no unfair representation. Nor need we decide whether, in that event, further processing of the grievance should be ordered instead of merely providing that dismissal of the cross-claim was without prejudice.
>
> Were we to decide that the District Court should have granted the Unions' motion for summary judgment of their cross-claim, we would affect Appellant's [plaintiff's] ability to bring his case to a conclusion. The difficulty raised by the Unions' cross-appeal is that if further processing of the grievance within the GM-UAW structure is ordered, Appellant [plaintiff] has been deprived of the opportunity to attain judicial resolution of his claim.

> Thus, we are compelled to comment on the proper course of action for the District Court to take on remand. Its choice is basically between ordering the grievance submitted to arbitration or deciding itself the merits of Appellant's [plaintiff's] claim against GM.
>
> * * *
>
> We believe that these interests [enforceability of arbitration agreements and prompt relief for employees under § 301] can both be served if the District Court orders arbitration but retains jurisdiction of the case until the claims against the Local and GM are settled.

52 F.2d at 314-15.

After the case was remanded, I referred the merits of plaintiff's grievance to arbitration. *See* 96 L.R.R.M. at 2827 n.6 and 2828 n.7. The Umpire found that discharge was an unduly harsh penalty, and that G.M. was liable for reinstatement with full back pay. Plaintiff and Local 166 now contend that the arbitration award retains vitality, even if I find that the Local did not breach its duty of fair representation.

I disagree. The union's cross-claim proceeded on two theories. In Count I, the unions claimed that G.M.'s refusal to process plaintiff's grievance on its merits violated the collective bargaining agreement. In Count II, they appeared to seek indemnity from G.M. "If the Union defendants, or either of them, are held or found liable to plaintiff for any monetary damages, then defendant GM is or will be liable to said Union defendants for any and all of said damages assessed against them, or against either of them." Cross-claim, at 4-5. Although neither theory is particularly lucid, I believe that they can be explained in the following

manner.[3] In the first Count, the unions sought arbitration of their dispute with G.M. over the effect, under the contract, of Panter's mishandling of the grievance. *See, e.g., United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 567-68 (1960). This Count could have included arguments that Panter substantially complied with the exchange deadline, or that the practice at the plant somehow modified the terms of the collective bargaining agreement. In Count II, the unions sought to have an umpire determine the merits of plaintiff's grievance, if I found that they had breached their duty to represent plaintiff fairly. *See, e.g., Vaca* v. *Sipes, supra*, at 196.

I believe that the Court of Appeals intended to reverse only my dismissal of Count II. It stated, "In view of our reversal of the unfair representation conclusion, we need not decide whether the Unions' cross-claim was well taken had there been no unfair representation." 523 F.2d at 314, quoted above. Only the theory of Count II assumed that the duty of fair representation had been breached. Moreover, the Court discussed the tension between enforcing agreements to arbitrate and providing prompt remedies for violations of § 301. 523 F.2d at 314-15. This discussion could have applied only to Count II. Thus, I conclude that my dismissal of Count I remained intact.[4]

[3] Although this analysis omits ambiguities in the language of the two Counts, it addresses the two distinct theories upon which the unions could have proceeded in their cross-claim.

[4] In the event that this case is appealed again, I add the following observations to assist the Court of Appeals in terminating this litigation. As I now interpret Count I of the unions' cross-claim, G.M. should have been compelled to arbitrate the issue of the effect of plant practice on the enforceability of the exchange deadline. *See e.g., United Steel Workers of America* v. *American Manufacturing Co., supra*. The language of Count I did not state this claim clearly, however, and the unions never pressed this argument at any time during the litigation. At this late date, I find that arbitration of this issue would be unjust.

(Continued on following page)

From the language quoted above, I also conclude that the reversal of Count II was predicated upon the assumption that Local 166 would be found to have breached its duty of fair representation. I have now decided once again that it did not. Without the breach, there is no grievance to arbitrate. For this reason, the arbitration award is unenforceable.

An appropriate order is entered with this opinion.

/s/ John Feikens
Chief United States District Judge

August 13, 1981

(*Continued from preceding page*)

The unions have never presented any evidence that the plant practice "extended" the exchange deadline more than a few days. In this case, William Moon did not try to exchange plaintiff's statement with G.M. officials until three weeks after it was due. Thus, even if plant practice softened the strict timeliness requirement to a certain degree, plaintiff's grievance was still untimely.

Under normal circumstances, this issue of contract interpretation would be decide by an umpire. *United Steelworkers of America* v. *American Manufacturing Co., supra*. In this peculiar situation, however, I am convinced that such a gesture would be futile. First, neither the International Union nor Local 166 has taken the position that further arbitration should be ordered. Indeed, the International Union has taken no interest in any aspect of this case since the Court of Appeals, in *Ruzicka I*, affirmed my finding that it had not breached its duty. Whether or not this lack of concern constitutes withdrawal of this Count, it underscores the fact that the unions do not appear interested in prolonging this case. Ten years have passed since the complaint was filed. I have already heard all of the evidence on this issue as part of plaintiff's fair representation claim. If this issue was referred to arbitration, it would be decided on very stale evidence. Arbitration is intended to produce a prompt judgment on a fresh record. To the degree that these goals have not already been thwarted, they are better served if I decide the issue myself. *See Vaca* v. *Sipes, supra*, at 196 (court may decide contract issue after finding breach of duty of fair representation). I find no evidence from which anyone could conclude that the plant practice modified the contract enough to make plaintiff's grievance timely.

ORDER

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed August 13, 1981)

(William Ruzicka, Plaintiff, v. General Motors Corporation, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, U.A.W., and its Local Union 166, Defendants — Civil Action No. 36598)

At a session of said Court, held in the United States Courthouse and Federal Building, City of Detroit, County of Wayne, State of Michigan, on the thirteenth day of August, 1981.

Present: John Feikens
Chief United States District Judge

For the reasons stated in the accompanying opinion, It Is Ordered that this case be, and the same hereby is, Dismissed in its entirety.

/s/ John Feikens
Chief United States District Judge

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Decided and Filed May 23, 1983)

(William Ruzicka, Plaintiff-Appellant, v. General Motors Corp., et al. Defendants-Appellees — No. 81-1563)

Before: Contie and Krupansky, Circuit Judges; and Celebrezze, Senior Circuit Judge.

Krupansky, Circuit Judge.

This is the third appeal in the instant case to reach this Court. Appellant William Ruzicka (Ruzicka) here appeals from the order of Chief Judge Feikens which dismissed his unfair representation suit against his union (Union) upon the factual finding that the bargaining representative's failure to timely file Ruzicka's grievance with the employer (GM) was due to union reliance upon the prevailing practice between the Union and GM of freely granting extensions of the contract date for filing the grievance. Pursuant to finding that the Union breached no duty (2) to Ruzicka, Judge Feikens concluded that GM was entitled to rely upon the termination of Ruzicka's claim under the grievance clause of the contract and so could not be liable for breach of contract.

The salient fact of this controversy, and the law of the case established at the two previous appeals, are throughly delineated in the prior decisions of this Court and those of the district court. *Ruzicka* v. *General Motors Corp.*, 336 F.Supp. 824 (E.D. Mich. 1972), 85 L.R.R.M. 2419 (E.D. Mich. 1973), 86 L.R.R.M. 2030 (E.D. Mich. 1973), *rev'd*, 523 F.2d 306 (6th Cir. 1975), *reh. denied*, 528 F.2d 912 (6th Cir. 1975) [*Ruzicka I*], 96 L.R.R.M. 2822 (E.D. Mich. 1977), *vacated*, 649 F.2d 1207 (6th Cir. 1981) [*Ruzicka II*], 519 F.Supp. 893 (E.D. Mich. 1981)

This Court's mandate on the second remand was to conduct a hearing on [the] *narrow issue*" of "whether there was *in fact*, actual reliance by Panter or other union officials on the prevailing practice of freely granting extension." 649 F.2d at 1211 (emphasis added). This explicit direction to conduct a "factual" inquiry into a "narrow issue" now compels this Court to review the findings below on the basis of Fed. R. Civ. P. 52(a) and the "clearly erroneous" test.

Ruzicka seeks to avoid applying the clearly erroneous test herein by shifting the focus of the proceeding below from the narrow issue specified in the mandate to (1) the broader issue of determining the scope of the "past" or "prevailing practice"; and (2) the legal issue of defining "reliance".

By his first argument, Ruzicka contends that since the record does not show a "well-defined, recurring practice [of granting extensions of time] that is clearly understood by all parties", "there can be no past practice within the legal meaning of the term." It would follow, therefore, that where there is, in fact, no "past practice" within the meaning of that labor law term of art, the Union would have acted upon a good faith, but *mistaken*, belief that such a practice obtained. The case law is clear that such good faith errors do (3) not insulate unions from liability in section 301 cases. 29 U.S.C. § 185. *See Ruzicka I*.

The short answer to this first objection is that the existence of a clear and definite practice of not insisting on contractual deadlines when an extension was requested has been the law of this case for over ten years. As our Court noted in *Ruzicka II*:

> In its initial memorandum opinion, the district court had found that extensions of exchange deadlines were freely given by both the Union

> and GM during Panter's term as committee chairman. This finding was reinforced by testimony received on remand that the prevailing practice was for both parties to grant extensions at will if one party was not prepared to exchange statements, even after the exchange date had passed.

649 F.2d at 1210. The district judge was manifestly correct in concluding that our instruction on remand was to determine "whether there was, in fact, actual reliance" upon this established practice. *Id.* at 1211.

Ruzicka's second attempt to shift away from the "narrow issue" considered on the second remand is the assertion that the definition of "reliance" involves conducting an inquiry into the reaction of a reasonable man to the past practice and not whether the individual union officials herein actually relied upon prevailing practice.

The Supreme Court in the recent case of *Pullman-Standard* v. *Swint*, — U.S. —, 102 S.Ct. 1781 (1982) held that inquiries as to "intent" or "the basic reason" for conduct are "pure question[s] of fact", subject to the clearly erroneous rule. *Id.* at 1790. Thus, the inquiry here is not whether the union should have relied, or whether it was rational to rely, but whether the actual, substantially motivating reason for the Union's decision to not timely present Ruzicka's discharge grievance to GM was its reliance upon an established prac- (4) tice. This, by the plain teaching of *Swint*, is a pure question of fact. *Id.*

A review of the record on second remand, particularly the testimony of Union representative Panter and of the evidence from the original trial cited at 519 F.Supp. 895, compels the conclusion that the trial court's finding of motive or intent for the union's conduct is not clearly

erroneous; *i.e.*, this Court does not have a "definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948).

An additional issue concerning the continuing viability of an arbitration award, originally litigated below as a Union counter-claim against GM, has not been appealed by the Union and is therefore not before this Court on review. Accordingly, the decision of the district court is hereby Affirmed.

JUDGMENT

(United States Court of Appeals
for the Sixth Circuit)

(Filed May 23, 1983)

(William Ruzicka, Plaintiff-Appellant, vs. General Motors Corporation, et al., Defendants-Appellees — No. 81-1563)

Before: Contie and Krupansky, Circuit Judges; and Celebrezze, Senior Circuit Judge.

On Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the said District Court and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party to bear its own costs on this appeal.

Entered By Order Of The Court

/s/ John P. Hehman, Clerk

(*Certification omitted*)